Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROBIN ZAHRAN and
KAREN ZAHRAN, PETITIONERS

V.

FRANKENMUTH MUTUAL
INSURANCE COMPANY. RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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210 pp

QUESTIONS PRESENTED

1. Whether Plaintiffs were deprived of their right to due process of law by lower courts decisions and in so doing were deprived of there Constitutional Rights to a fair trial.

2. Whether Federal Courts below erroneously construed Wisconsin Statues governing private insurance contracts and interpreted it in contradiction to State law expressed by Wisconsin Supreme Court and did not follow the declared laws of the United States as declared by the United States Supreme Court governing contracts and disputes between private parties.

3. Whether the lower Federal Courts abused their authority by departing from the accepted and usual judicial proceedings.

4. Whether Federal Law preempts State Laws governing insurance contracts in diversity actions

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PETITION FOR WRIT OF CERTIORARI

Robin Zahran and Karen Zahran, petitions for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals, decision and order, dated 3/28/94, in the matter of Robin Zahran and Karen Zahran v. Frankenmuth Mutual Insurance Company. Decision is appended in this petition for Writ of Certiorari.

OPINIONS BELOW

1. The Decision and Order of the United States District Court for the Eastern District of Wisconsin, dated: 2/28/92.

2. Order of the U.S. District Court for the Eastern District of Wisconsin, dated: 3/26/92.

3. Order of the U.S. Court of Appeals for the 7th Circuit, dated: 3/28/94.

4. Order of the U.S. Court of Appeals denying Petition for Rehearing, dated: 6/9/94.

5. Order of the Honorable Justice John Paul Stevens to extend time to file a petition for Writ of Certiorari to and including 11/6/94.

JURISDICTION

The order of the Court of Appeals in this case was filed on March 28, 1994 and petition for Rehearing was denied on June 9, 1994. This case arose under 28 U.S.C. 1332 and 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Statement of Facts

ROBIN and KAREN ZAHRAN of Oak Brook, Illinois purchased a farm policy from Frankenmuth Mutual Insurance Company (1), issued on 8/5/88 and a policy separately insuring R. Zahran and K. Zahran.

On May 24, 1989, a tornado struck the farm buildings and structure causing sever damage.

On June 6, 1989, Frankenmuth sent its general adjustor, William Conaway, to assess

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1 The insured buildings are one structure consisting of numbered attached units named under the Declaration page attached together by common walls, electric wiring, a manure cleaning system, and a steel and glass lined separate slurry tank to hold manure.

the damage. He concluded that the farm structure is a one operational building entity damaged as follows:

(1) Unit #151, "is falling and dangerous, need a wrecker, (Tr. VI, p. 806)(Tr.VI,p.818)

(2) Unit #152 - totally destroyed valued at $ 139,000 insured for $ 100,000. (Tr.VI, p. 798)

(3) Unit # 153, totally gone, (Tr. VI, p. 838) insured for $100,000.

(4) Slurry tank, wasn't sure of extent of damage, will get expert to assess.(Tr.IV,p.805)

(5) Damage sustained to personal property including ventilation system, horse trailer, elevators, hay, straw, wagons, chopper boxes, bobcat, bay bine, cows and silo caps. (Exhibit C-5-C-6)

Conaway noted, "very important, some additional buildings may collapse, temporary measures should be taken to protect the property. (Exhibit C-7)

Conaway immediately hired Forest

Construction to perform temporary work to prevent any further collapse of walls by bracing east wall of Barn # 151 and to pull any shifted wall back as it had moved off its foundation.

Disputes and conflicting opinions arose as to the extent of damage and interpretations of coverages between Robin Zahran, his manager on one hand, Frankenmuth and its experts on the other hand.

Conaway estimated the damage at approximately $260,000. (Record on file)

On or about July 25, 1989, relying on his manager's reports, contractor's estimates, and Conaway's observations and assessments, Robin Zahran forwarded a proof of loss to Frankenmuth for $ 240,300.37. (Record on file)

As a result of Conaway's independent investigations and assessment, Frankenmuth forwarded additional various drafts in the amount of $136,687.74 made payable to Robin Zahran, Karen Zahran, Denmark State Bank, and First

National Bank of Francis Creek as loss payees, informing Zahrans that these payments were voluntarily paid by Frankenmuth with no requirement for submission of a proof of loss and are made as a result of their personal inspection of the damaged insured property recognizing that some disputes still remain. 2. (Exhibit C-1-C-4)

Frankenmuth's general adjustor, William Conaway, hired Earl Wildenberg, an expert on slurry tanks, to inspect the manure tank damaged by the tornado. Earl Wildenberg reported to Frankenmuth that the tank was severely damaged and is in, "fairly sad shape." (Tr. II, p. 186) It showed many signs of stress "racking" and it didn't hold its roundness. He felt, "very uncomfortable with its structural integrity."

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2. Robin Zahran hired Ullman Construction Company and paid them in excess of $20,000 to do temporary work on Unit # 151/#154 to minimize and stop further damage to lower level that houses animals and milking equipment. Frankenmuth paid $8,500.44 on Barn unit # 151 (a limit of $75,000)

(Tr. II, p. 187-189) A report dated 8/1/89 was sent on to Frankenmuth. In Mr. Wildenberg's opinion, the slurry needed to be completely replaced. The top ring was definitely damaged and felt the other three rings above ground were not substantially sound.

Earl Wildenberg testified that he spoke with Frankenmuth and that the conversation "wasn't very polite or kindly" and felt that, " he was being swayed into changing his opinion." (Tr. II, p. 191-193)

Contractors, contacted by the farm manager and Robin Zahran, stated that due to interdependent common walls shared by different named units of the building structure and roof shapes, you cannot rebuild Unit # 153 without rebuilding or repairing the other named units which include Barn units #151, #152, and #154. (Tr. Vol. 6, 803, 808, 809) (Tr. Vol. II, p. 263-265)

On September 8, 1989, Robin Zahran sent

a second proof of loss reflecting the amount still outstanding.

On September 11, 1989, R. Zahran contracted Frankenmuth stressing a sense of urgency to rebuild before winter as it is important to the dairy operation.

On September 18, 1989, Frankenmuth hired Larry Mours of General Adjusting Bureau (G.A.B.) to investigate the damage to the buildings.

Pursuant to Larry Mours request, a meeting took place on 9/20/89 between Frankenmuth's adjustor (Larry Mours), his advisor (Orvil Krueger -a barn repair specialist), Jerry Zeller (representing Morton Builders - a nation wide farm building specialty company), and Robin Zahran and his farm manager.

All agreed that the block walls and roof of barn unit # 152 shook and moved one eighth to one half of an inch.

This damage would require rebuilding or repairing the block walls and necessitate

rebuilding the ceiling and roof confirming Conaway's earlier observations, evaluations and assessment that Barn unit # 152 was a total loss.

Mours and Krueger stated that, "we noted multiple stress cracks in the concrete block walls but that it does not warrant roof replacement. You could barely tell that the roof has moved." (Exhibit E-3-E-8) Exhibit 17 of Mours report and Exhibit 18 of Zeller's Report) - Check exhibits

Zeller observed and stated that Barn unit 151 and 154 were to be replaced before he would rebuild Barn #153 - reasoning that the structural integrity of these units were damaged and they would not be able to hold the lean-to framing of Barn # 153.

These barn units as pointed out earlier share a common foundation wall, roof support, same cleaning system, vacuum and milking equipment, and electrical wiring. Zeller testified that the roof was shifted by the

tornado and the structural integrity of the buildings and barns are, " like dominoes, once you get them leaning and someone put another push, it could all go." (Tr. II, p. 263-265)

Mours investigated the damaged premises, took pictures and observed Barn 151 having the east wall "bowing out", the "roof slopes and sags" and Barn 152, "appears to have shifted. " (Tr. IV, p. 591)

Krueger's report to Mour indicated that there were damages to Barns 151, 154 and 152. He made observations to Barn 151 and 154, "east wall hanging over the side wall, barn leaning endways, roof dips and humps, and missing perlines etc. were missing from the structure of Barn 151." (4) (Record of file and Exhibit E-3-E-8)

Frankenmuth building specialist (Orvil Krueger), stated to Robin Zahran that he would do a good job and not a "nigger rigging job as Forest Construction (previously hired by Frankenmuth to do temporary work) had done."

(Tr., V. 3, p. 344).

Robin Zahran took personal offense and anger to this remark as he has been the subject of racial and hate acts himself in that area including property damage, vandalism, boycotting, and intimidation in excess of 80 acts since 1983 when he and his wife purchased the farm.(Records on file)

Larry Mours submitted to Frankenmuth Orvil Krueger's " Building Doctor" report stating, "don't be concerned about it's appearance. This is standard. He's an excellent man and court tested." (Exhibit E-1-E-2)

On October 9, 1989, Bob Spalding, claims supervisor of Frankenmuth, sent a letter to Robin Zahran and Karen Zahran stating in sum that they were rejecting these two papers purported to be Proofs of Loss. (Exhibit G-3-G-9)

Spalding reasoned in his reply that these proofs of loss were defective and that the 28th of July, 1989 proof of loss was superseded by the

subsequent proof of loss which was received on September 11, 1989, and that the items claimed are not validated or documented and some of them have been paid and some articles are in excess of applicable coverages.

Spalding further stated he paid the ventilation system and that he will send another person to reinspect the slurry tank to replace Wildenberg's evaluation of the tank and that Barn unit #152 (per Mours and Krueger's evaluation and estimate) had no damage.

Spalding further stated, " let me assure you, Mr. Zahran, that should I become in the possession of objective information which would require the further indemnification of your self under the policy of insurance that I will promptly do so." . (Exhibit G-10-G-13)

Mour and Krueger confirmed that Barn 152 roof, being called the warming barn, had moved 1/8 of an inch. "We noted multiple stress cracks in the concrete block walls but that it

does not warrant roof replacement. You could barely tell that the roof has moved." It was through Krueger's expert eye that he pointed out the movement points to Mr. Mours. (Exhibit E-3-E-8)

On October 18, 1989, Robert Spalding sent Robin Zahran a letter with a proposed contract from Orvil Krueger stating in part, " further, you can see where he (Krueger) is estimating that he can repair the wind damage to the wood 2-story barn and also do some minor masonry work to the warming barn for a total of $6,274.00" (Exhibit G-10-G-13)

Robin Zahran sent a letter dated 11/2/89 addressed to Spalding stating that Morton Builders had submitted a figure in excess of $140,000 to repair the barns. Since Mr. Krueger had submitted a bid for $6,274 and there was no way that Morton Builders could match Mr. Krueger's figures, have Mr. Krueger do the work immediately per his proposed contract. (Exhibit

G-1-G-2)

Robin Zahran signed Orvil Kreuger's proposed contract and faxed it to Mr. Spalding along with a letter saying in essence, "hurry up and fix it." (Record on file)

Robin Zahran called Mr. Krueger and requested of him to start fixing the barns as per his proposed contract as long as he brings the barns back to the original condition before the tornado.

Robin Zahran found out that day that Orvil Krueger was not interested in fixing the barns anyway as Mr. Krueger told Zahran that day that he had offered the proposed contract to G.A.B. and not to Zahran and that the only one who could be a party to that proposed contract is G.A.B. (Exhibit G-14-G-17)

In his letter to Bob Spalding dated 11/1/89, Larry Mours stated that Krueger would have a chance to decline Robin Zahran's request to do the work before Robin Zahran received Krueger's

proposed contract. (Record on file)

Robin Zahran called Larry Mours and asked him to sign Krueger's proposed contract to GAB and have Krueger do the work. Mours stated that Krueger is not interested in doing it. Robin Zahran questioned Larry Mours as to why send a proposed contract and engage in all these plays, performances and acts for the last two months since he knew Krueger was not interested in doing the work. Why have a phony proposal?

Slurry Tank

After 9/18/89, Larry Mours contacted Earl Wildenberg questioning him about the condition of the slurry tank and his report of 8/1/89 to Frankenmuth referencing its condition.

Mours hired Joel Portmann as a new expert to reinspect the tank. Mours prepared a report describing the slurry tank condition attributing it to Portmann stating that Portmann would repair the entire tank by rerolling the steel and glass sheets for the amount of $14,000. (Exhibit E-9-E-

11)

Portmann observed the entire tank structure to be not entirely repairable. (Tr. V, 704-705) Portmann testified that he was not going to be responsible for the work (Tr. V., 709) and he and Frankenmuth refused to fix it for fear of future liability. (Tr. V. 709)

A year or so later, Portmann met with Robin Zahran and assuming the litigation was over, gave a cost to replace the slurry tank at $77,000, as he knew it was damaged. He would take the damaged tank for scrap based on his earlier observations. (Exhibit E-12)

On November 8, 1989, Frankenmuth sent a letter to Robin Zahran stating that Frankenmuth only indemnifies for loss and "we do not, however, undertake direct repairs of damaged property. That remains your responsibility. Neither Frankenmuth nor the General Adjustment Bureau has entered into any contract for repairs with Orvil Krueger. His proposal was submitted

to GAB. (Exhibit G-14-G-17)

"Also, you have advised me that Mr. Krueger does not wish to repair your barn. I am sure there are other barn repair people who may be interested in repairing your barns along the lines that Mr. Krueger has proposed." (Exhibit G-14-G-17)

Frankenmuth made an additional payment of $14,000 to repair the slurry tank in December of 1989 along the lines Mours described in his report and further engaged into offering more payments towards the damage in exchange for full settlement, never mentioning any misrepresentation, concealment or fraud violations of policy conditions by either Robin Zahran or Karen Zahran as a defense or reason for no further payments. (Exhibit G-18-G-20)

B. Procedural History

As a result of Frankenmuth's actions and behavior in the adjustment of the claim, Robin Zahran and Karen Zahran filed an action in

January of 1990 for breach of contract, bad faith in the adjustment of the claim motivated by racial overtones.

Frankenmuth filed their answer and affirmative defenses to the complaint and a counterclaim for the amount previously paid by Frankenmuth, alleging the Zahrans violated the policy provisions of misrepresentation, concealment and fraud and that Frankenmuth relied on the Zahran's misrepresentation.

On July 8, 1990, a fire occurred at the main farm buildings and after extensive investigation, Frankenmuth voluntarily paid $99,995.00 for damages to the premises.

Frankenmuth immediately amended their affirmative defenses and counterclaim alleging additional misrepresentation, concealment, and fraud.

On March 18, 1991, Robin Zahran and Karen Zahran filed an action against Frankenmuth for breach of contract and bad faith as a result of

these fire losses.

Robin Zahran and Karen Zahran requested the production of documents and names of all the persons who may have had any knowledge, information or circumstances about the tornado or the fires from Frankenmuth as the fires had a suspicious nature in lieu of Frankenmuth's amendment of their affirmative defenses and counterclaim. (Exhibit G-21-G-26)

Frankenmuth forwarded names of witnesses/ documents and forwarded them to Plaintiff's attorney stating that they have fully complied with the production request. (Exhibit G-27-G-30)

On December 9, 1991 and one week before the trial, Jim Hoey, attorney for Frankenmuth, mailed a letter with attachments to Plaintiff's attorney enclosing a new document attributing it to Robin Zahran as his presentation in the acquisition of the policy of insurance. (Exhibit J-5-J-6 and J-7)

Later discovery found that this document was

falsely created by Frankenmuth as was admitted to that fact by Frankenmuth's agent.

A trial commenced on December 16, 1991 and the jury found for the Defendants according to the special verdict of which Plaintiff's appealed. (Exhibit A-1-A-5)

The Appeal Court denied Plaintiff's Motion to supplement the record with newly discovered evidence as did the District Court per Rule 10-E. (Record on file)

As a result of Discovery of Case #91-C-808 and on 10/28/92, Frankenmuth produced 2 inch thick documents and a audio/video tape that was material to the case.

The Appeal Court denied Plaintiffs motion to supplement and correct the record.(Record on file)

In April and May, 1993 for the fire case, additional names of witnesses with knowledge of circumstances of the tornado and fire losses were disclosed for the first time. Those names

include Frankenmuth's local agents in the adjustments of the fires or tornado claims.

Frankenmuth concealed the existence of these witnesses and documents throughout the tornado litigation. Disclosing some of these witnesses in the middle of the trial in May of 1993 was too late to carry out any discovery regarding the circumstances of the tornado claims or the suspicious fire.

Communications, between Frankenmuth's claims manager and local agents regarding the fire losses before the fire happened, was revealed for the first time at the trial. (Record on file)

On March 28, 1994, the appeal court issued it's order and judgment affirming district court jury verdict in part and remanding the case to the district court to enter judgment not inconsistent with their opinion. (Exhibit B-1-B-22)

On June 9, 1994, no vote was taken on the

rehearing and accordingly, petition for rehearing in banc was denied. (Court record on file)

REASONS FOR GRANTING THE WRIT

1. Petitioners were deprived of their rights to due process of law and fair trial resulting in miscarriage of justice

1-(a) Defendant's concealment of material evidence in violation of Rule 26 E and Wisconsin Statue (801.01)

Defendants did not fully comply with the production request. They intentionally concealed documents that should have been produced. These documents were material and necessary to Plaintiff's case and would have aided Plaintiffs contentions against Defendant. (Exhibit G-21 - G-26 and G-27 - G-30)

Plaintiffs served Discovery. (Exhibit G-1 - G-26) Frankenmuth and their attorneys represented that they will produce all documents requested. right to a fair trial and cross examination.

Defendant's failure to produce documents and

names of witnesses is an act of concealment under F.R.C.P. 26,(E) and failure to grant motion to amend and correct the record by the lower courts denied these petitioners a fair trial and their right to cross examination and substantial justice.

Under Wisconsin Statue 804(0.1), parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action. The question asks whether it related to the claim or defense of the party seeking discovery or to the claim or defense of any other party including the existence, description nature, custody, condition and location of any books, documents or their tangible things and the identity and location of persons having knowledge of any discoverable matter.

It is not grounds for an objection that the information sought will be inadmissible at the trial, if the information sought appears

reasonably calculated to lead to the discovery of admissible evidence, including insurance agreements and supplemental responses.

A party is under a duty seasonably to supplement his/her response with respect to any questions directly addressed to (1) the identity and location of persons having knowledge of discoverable matters and (2) supplement and correct the record by the new answers and facts.

Wisconsin Supreme Court held that discovery is a provisional remedy which is granted by statues, rather then by order of court, DUBMAN V. NORTH SHORE BANK, (1977) 249 n.w. 2nd 797.75 Wis. 2nd 597.

This Court stated that a trial, " is not a game of a blindman buff." UNITED STATES v. PROCTER AND GAMBLE CO., 356 U.S. 677 682 (1958)

It is a search of truth, "8" , Wright and Miller, Federal Rules of Practice and Procedures, } 2001 at 14.

The U.S. Supreme Court held that failure to

disclose all fact witnesses and all materials requested will cause a mistrial since the right to due process of the litigant has been violated and his ability to prove his case has been curtailed by the concealment of the other party and no party should benefit from such act, neither be rewarded.

All the materials and witnesses that were concealed were discovered by these petitioners after the trial.

Federal Rule of Civil Procedure (26-E) states that failure to disclose names of witnesses and all documents requested is considered an act of concealment. (1)

1-(b) Defendants Introduced inadmissable, impressionable and prejudicial evidence at trial.

Plaintiff's attorneys, Defendant's attorneys and the Trial Judge agreed before trial that the fire litigation and claim would not be brought up or introduced at trial as the two cases were not consolidated but Defendant's

attorney brought the issue up at trial and in his opening and closing arguments, contrary to agreement. (Exhibit J-8 - J-12) and (Exhibit K-1 - K-3)

At Robin Zahran's cross examination (Tr.,pages 526-536) inspite of Plaintiff's attorneys objection, the Trial Court ordered Robin Zahran to answer Defendant's attorney about questions regarding the fire.

In Defendant's attorney's opening statements (Tr. Vol 2, p. 115), he stated, " That in July of 1990, Frankenmuth is still on risk. They are still insuring Mr. Zahran as of July of 1990, there is a fire in # 151 and # 152 and that Frankenmuth paid $75,000 for barn # 151."

This Court addressing the unfair prejudice explained that an ill name shouldn't be shown. It is not that character is irrelevant, it weights too much on the jury and persuade them as to prejudge one with a bad general record and deny him a fair trial and opportunity to defend

against a particular charge.

The overriding policy of excluding such evidence despite its admitted value is the practical experience that its disallowance tends to prevent confusion of issues and unfair surprise. MICHELSON v. UNITED STATES, 335 U.S. 469 4755 7669.

Plaintiffs were prejudiced by the introduction of irrelevant evidence in direct violations of Rules 103-b, 403, 404, 404-b, 406. SIMPLEX INC. v. DIVERSIFIED ENERGY SYSTEM, 847 F2d 1290.

In RODES, 886 F2d 380, the 7th Circuit held that a witness may not be impeached by extrinsic evidence concerning collateral matters elicited on cross examination and is prohibited.

Under rules pertaining to other acts, the court must establish whether evidence had special relevance in that it is offered to show material fact. If the court finds sufficient relevance, then it should weigh probative weight

against prejudicial effect. Evidence of settlement offers or payments to prove lability or amounts of claim are inadmissable regardless of which party attempts to offer the evidence. Rule 408 28 U.S.C. PIERCE v. TRIPLER AND CO., 955 F2d 820.

This Court held if one cannot say with fair assurance after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected, the inquiry cannot be merely whether there was enough to support the result apart from the phrase affected by the error, it is rather even so, whether the error itself had substantial influence. If so, or if one is left in doubt, the verdict cannot stand. BURTON v. UNITED STATES, 391 U.S. 123 135 88 c ct. 1620 L Ed 476 (1968)

Under Fed. Rule of Evidence, 103(a),

reviewing courts review a challenged evidentiary decision to determine whether "substantial right of a party is affected. When evidence is charged to have been improperly admitted, any error is more likely to be found harmful and thus reversible, if the evidence is substantively important, inflammatory, repeated, emphasized, or unfairly self-serving." S. Childress & Davis, 1 Standards of Review.

As this Court held all along regarding admission of evidence that the most critical factor in determining whether an error is harmless is the strength of the case.. UNITED STATES v. LARSEN, 5966 F2d 347 348.

1-(c) trial counsel's opening and closing arguments were inflammatory, prejudicial and improper.

Trial counsel's opening statement were inflammatory and designed to appeal to jury's emotions and confused the issues.

He states, "Then in July of 1990,

Frankenmuth is still on the risk, they're still insuring Mr. Zahran. July of 1990, there's a fire in 151."

Plaintiff's attorney asked for a side bar explaining to the Court the parties agreement including that of the Court not to bring the fire issue. The Court reversed its position and instructed Defendant's attorney to proceed:

" July 1990 there was a fire in 151. A sworn statement in proof of loss was submitted by Mr. and Mrs. Zahran, dated August 28, 1990, the amount claimed was in excess of $116,802.50. Total loss was claimed for barn 151, the limit of liability of the policy was $75,000. Frankenmuth paid to Mr. Zahran roughly $100.000 on November 1, 1990, $75,000 of which included the total limit of liability on barn 151. And that rather, Mr. Zahran did not keep his end of the deal; that the policy is void because he violated the policy provision relating to misrepresentation, concealment and fraud. Thank you very much."

Three hours earlier that day, Plaintiffs denied Defendant's offer brokered by the Trial Judge for $110,000 as a settlement of their lawsuit.

Courts held that inflammatory comments by opposing attorneys that is not supported by evidence is prejudicial and prohibited and should be construed as reversible error. ALL STATE v. JAMES, 845 F2d 315.

Defendant's attorney's closing arguments in asking the jury, " to send a message to that man " and by advising the jury that Robin Zahran submitted a third proof of loss which was false prejudiced Robin Zahran and inflamed and poisoned the jury.

His comments that Robin Zahran contrived, "with these other people to make claim for them. We have a situation where we have a sophisticated insured. We're not dealing with someone like yourself.. Now this is your chance to say, hey, this shouldn't be allowed. This is not the way

business is done. It's time to put a stop to this and to say the policy is void. Then we have a fire in 151, in July of 1990. Mr. Zahran said he made a claim for the limit. When asked if Frankenmuth paid it you might remember that he first denied it. I showed them the check, the check is in evidence. It's dated October 31, 1990, it's in the amount of $75,000, Mr. Zahran endorsed it. Yet, his attorneys believe that he's entitled to more money on 151. We submit that the answer is no." (Tr. Vol. VI, p.936-938, 946-947) and (Exhibit K-1 - K-3)

Defendant's counsel made comments to the jury referring to the attorney of the Plaintiff's, "he's impeaching his own witness", (Tr. IV, p. 548) when Plaintiff's attorney was examining Robin Zahran on direct testimony.

Trial Court not exercising its authority to stop such abuse requires reversal as it effected Plaintiffs substantial justice and their right to a fair trial.

This case Court held in COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 91 S. Ct. 2022 29 L. Fd 2d 5664 (1971), that the assistance of counsel is among those constitutional rights so basic to a fair trial that the infraction can never be treated as a harmless error. UNITED STATES v. HASTINGS, 461 U.S. 499 508 6 103 s.c. (1974).

Comments by Defendant's attorney in his objections or responding with facial expressions to the jury when admission or exclusion of evidence was proceeding, invoking statements that was obviously for no other than to inflame and prejudice the jury constitutes reversible error to Rule 103 c. FAHY v. CONNECTICUT. 375 U.S. 85 86-87 84 S.Ct. 229 230 11 L. Fd. 2d 171 (1963)

The Defendant's attorney in his closing arguments went on to state that, "Then, we have a fire in #151 in July of 1990. Mr. Zahran made a claim for the limit. When asked if Frankenmuth paid it, you might remember that he first denied it. (Tr., p. 947) His attorney believe that he

is entitled to more money on # 151. In conclusion ladies and gentlemen, we submit that Mr. Zahran just went too far, he violated the policy provision. The policy is void, and that you should answer the first question, "yes."

At trial, Defendant's attorney questioned R. Zahran if, as part of the application for insurance represented to Frankenmuth that, his brother-in-law lives at the farm. (Exhibit J-1 - J-4, Tr. Vol 3, p. 450-460) At Plaintiff's attorneys objection, the Court ordered R. Zahran to answer. R. Zahran, denied he ever made such presentation. The brother-in-law representation memo was introduced into evidence as part of the application for insurance. (Exhibit J-5- J-7 and J-7)

At the subsequent trial of the fire loss, Frankenmuth agent, Luis Ruesch testified that R. Zahran never presented such representations to Frankenmuth and that the above memo was created at Frankenmuth's office.(Trial record testimony

of Case No. 91-C-808)

1-(d) refusal of Trial Court to allow Plaintiffs to explain racial prejudice.

Plaintiff's pleaded in their Complaint that Frankenmuth failed to adjust the claims properly and that their adjustment was motivated by racial overtones. The Trial Court refused to allow Robin Zahran to address this issue in his testimony. (Tr. testimony, p. 342-346) The judge said, "It's offered to inflame the jury," and he would declare a mistrial if it happened again.

When Frankenmuth tried to attribute the dirty slur, "nigger rigging" to Robin Zahran, the judge questioned the other side, "Are you objecting to that.? It is for your benefit." (Tr. testimony, p. 583, 585-617) R. Zahran has been the subject to hate crimes in that community.

Refusal of the Trial Court to allow Robin Zahran to explain the racial bias. Refusal of the Trial Court to allow R. Zahran to explain the

racial bias and slurs which was a part of his Complaint deprived him of a fair trial as well as created a negative impression to the jury.

Appearance of impartiality by the Trial Judge must be exercised and the intervention and lack of neutrality is a plain error that deprived Robin Zahran of a fair trial in the District Court.

The 8th Circuit held in UNITED STATES v. GUNTHER, 631 F 2d 583 587, that a judge interference is a miscarriage of justice and schooling the test of evidence is abuse of discretion, COTY v. SEAWALL, 908 F2d 1053 1058.

1-(e) time limitation and restraints on Plaintiffs to present their case before trial commenced.

Nine (9) hour's were allocated to Plaintiffs to present and rebuttal their case. It was not enough.

Karen Zahran did not have time to defend herself from Defendant's allegations. Defendants

elected not to question her regarding their allegations as they had time to examine her.

Plaintiffs were not afforded the opportunity to rebuttal all issues raised on cross examination. Plaintiffs had subpoena Pat Harmon (Frankenmuth's claim manager) to testify but did not have enough time to examine him. (See Harmon's Deposition, Exhibit I-1 - I-2)

Each party is entitled to present its case in full and to rebut, UNITED STATES v. THALAMUS, 711 F 2d 235 241 (19 F.R.E. 56) C.A. 7. Wigmore, on evidence @ 14 at 740.

2. Was the interpretation of the Lower Courts of Wisconsin Statues governing insurance contract, erroneous and did their interpretation create a conflict of laws with the forum state, as well as with the Federal Laws.

2-(a) misrepresentation, concealment and fraud provisions in an insurance policy.

Under rules of decision as stated in ERIE doctrine, ERIE r. CO.v. TOMPKINS, 304 U.S. 64 1.

ED. 1188 58 s.c. 817, in diversity of citizenship action.

The Erie rule guarantees litigants that if they take their state law cause of action to Federal Courts and abide by the rules of that court, the result in their case will be the same.

Under Wisconsin Law reviewing courts will review questions of law independently without deference to trial court, SCHANKEE v.WISCONSIN COUNTY MUTUAL INC. CORP., 177 Wis. 2d 746 751 502 N.W. 2D 866 868. The insurance policy is treated as any other contract and is construed so as to carry out intentions of parties. GROTELUESCHEN v. AMERICAN FAMILY MUTUAL INS. CO., 171 Wis. 2d 437 492 N.W. 2d 131, 134 (1992).

Any policy exclusions are to be construed against insurer and when terms of insurance policy are plain and unambiguous, court must apply those terms as written.

In diversity actions, Federal Courts are bound by the expression of the state law found in

the decisions of the states highest court, HILBURT SALES, JR. v. STATE FARM FIRE AND CASUALTY CO., 849 F 2d 1383 (11th cir.) 1988. Wisconsin Supreme Court held in TEMPELIS v. AETNA CAS. AND SUR. CO., 485 N.W. 2d 217 (Wis. 1992), that avoidance of coverage will only apply to items that were misrepresented subject to materiality as held in NOLDEN v. MUTUAL BENEFIT(i.d.) Frankenmuth did not rely on R. Zahran's alleged misrepresentations as the Appeal Court found, contradicting the jury findings. The Appeal Court should not replace its finding of facts by those of fact finder and issue a Judgment accordingly.

Plaintiffs did not violate the misrepresentation, concealment and fraud provisions of the policy. There is no evidence to substantiate that finding by the jury as to Karen Zahran whatsoever.

Wisconsin Statue, 631.11(2) holds that reliance is a must to make misrepresentation

material, NORTHWEST NATL. INS. v. NEMETZ, 400 N.W. 2d 33 135 Wis. 2d 245, and for fraud to be alleged, a party must state the false representation as well as the identities of the parties and prove it at trial. Federal Rule of Civil Procedures, 9 (b) 28 U.S.C.A.

Defendant's did not prove the elements of fraud at Trial. Neither have they denied that they did not prove fraud by Karen Zahran at trial to the Appeal panel, as to holding such view will prove to be clearly frivolous.

Under Wisconsin Law to succeed on misrepresentation cause of action, Plaintiffs must show that Defendant made representation of facts; that representation of fact was untrue; that untrue representation was made without knowing representation to be true or recklessly without caring whether it was true or false; and that Defendant made representations with intent to deceive and induce Plaintiffs to act on it to its pecuniary damage; and that Plaintiffs

believed representation of fact to be true and relied upon it to its damage. MAJOR MAT CO. v. MONSANTO CO., 969 F2d 579.

The Jury was poisoned by the prejudicial evidence and arguments of Defendant, including the falsified application for insurance.

R. Zahran totally relied on others in asserting his views, including those of Frankenmuth's agent (William Conaway) reports and letters. (Exhibit C-1 - C-7) and ...

American Structures reports of 8/7/89 (Earl Wildenberg, Exhibit D-1 - D-3) that Frankenmuth hired to evaluate the slurry tank and ...

Mours and Krueger's presentations and assessments of damage on 9/20/89. (Exhibit E-1 - E-11)

In his testimony (Exhibit H-1 -H-7), Bob Spalding (claims manager) testified that he waived the requirements of the proofs of loss of Robin Zahran and explained that:

" We wanted the insured to be comfortable

that he wasn't going to be signing something tantamount to a release on his claim."

Pat Harmon, claims manager for Frankenmuth, testified in a deposition that neither Robin Zahran or Karen Zahran committed misrepresentation or tried to cheat Frankenmuth. (Exhibit I-1 - I-2)

Spalding's testimony at trial and correspondence with R.Zahran demonstrated that there was no misrepresentation by R. Zahran but conflict off opinion between contractors and experts. (Exhibit G-1 - G-30)

Frankenmuth held the position that they paid the claims in full as was in their pleadings and their Answer to Complaint and Affirmative Defenses. Contrary to what they argued to the Appeal Court Panel that when they suspected fraud, they refused any further payments. (Record on file) (Exhibit B-1 - B-22)

That is simply false.

2-(b) waiver and estoppel of certain

defenses by insurers.

Plaintiffs contend that Defendant, Frankenmuth waived their right to any policy defenses to avoid Plaintiff's policy of insurance.

This Court declared that one desiring to void or rescind a contract on grounds of mistake or fraud must upon discovery of the fact at once announce his/her purpose and adhere to it, GRYMES v. SANDERS, 93 U.S. 55 23 L Ed 798.

Wisconsin Statue, 631.11(4) states that insurer must notify insureds of their specific defense of policy within 60 days from discovering the knowledge of that defense.

Frankenmuth kept paying and adjusting the claim and collecting premiums from both insureds and paid for the tornado loss upon their additional inspection.

Bob Spalding testified that he rejected the two proofs of loss and waived the proofs of loss requirement. Spalding as quoted: "When we made

our payments we did waive the proofs of loss only so Mr. Zahran wouldn't feel by signing the checks that he was signing off on the claim or if there was something else that was still pending. So we did waive those. We wanted the insured to be comfortable that he wasn't going to be signing something tantamount to a release on his claim." (Exhibit H-1 - H-7)

These are the two proofs of loss that the Trial Court stated supported the alleged misrepresentation by Robin Zahran as well as Defense attorney's opening and closing arguments.

Spalding testified in describing Barn # 151 and # 154 that there was confusion as to these barns.

That's exactly the point that Robin Zahran was impeached on (Affirmed by the Appeal Court) when he said that $75,000 is not for what you're talking about because Frankenmuth was trying to include the boundaries of #154 in Barn # 151 while Robin Zahran knew the boundaries of Barn #

151 and # 154 are different than Frankenmuth's assertions, as it was later proved during cross examinations of Bob Spalding.(Exhibit H-1 - H-7)

Spalding in his letter of 10/9/89 did not know where the boundaries of the Barns were.

Frankenmuth kept paying towards the claim while negotiating for a final settlement. The first time Frankenmuth alleged misrepresentation by Plaintiffs was in their answer to Complaint alleging that they paid the policy on merit and in full and that the policy is void for misrepresentation.

They had nothing to lose and everything to gain by such allegations.

Wisconsin Law provides that estoppel will bar a party from asserting legal or equatable right as Wisconsin Supreme Court held in KELLOGG v. VILLAGE OF VIOLA, 67 Wis. 2nd 345 350 227 N.W. 2nd 55 58.

When advised of wrong, a party must decide whether to rescind or affirm an act with

reasonable dispatch and if he fails, he looses the right to rescind and must seek compensation in damages. PENCE v. LANGDON, 99 U.S. 578 25 L.E.D. 420.

Frankenmuth's allegations that they were aware of misrepresentations by Robin Zahran through the claims adjustment but never declared their intentions of voiding the policy, should estopped them from voiding the policy.

This Court held in GLOBE MUTUAL OF N.Y. v. WULFF, U.S. 326 24 L.E.D. 387, that conduct after breach indicating election to treat policy as valid keeps policy valid. No one shall be permitted to deny that he intended the natural consequences of his act, when he has induced others to rely upon them, and is as applicable to insurance companies as it is to individuals.

This court further ruled in ATLANTIC COAST LINE RAIL COM. v. STATE OF FLORIDA, 55 S. Ct. 713 295 U.S. 310 79 L. Ed 1451, that money had and received must show receipt of money in such

circumstances that possessor will offend equity and good conscience in retaining it. The question is not whether law would put him in possession of money if transaction were new, but whether law will take it out of his possession after he has been able to collect it. See U.S. v. ALANO, 113 S.Ct. 1770 123 L 2d 508.

The Seventh Circuit held in EAGLE FOUNDATION INC. V. DOLE that a party is precluded from abandoning previous positions with one under lining prior judgments.

Wisconsin doctrine declared in MARSON V. LABOR INDUSTRY REVIEW COMMISSION 178 Wis 2d 118 N.W. 2d p. 38, states either action or non action to promote reliance to own determent will invoke estoppel. Here, the agency instrumentally causing harm was exclusively within the exclusive control of Frankenmuth.

Wisconsin Supreme Court rule governing cause of action for restitution under void or voidable order is a type of broader cause of

action for money had and received, a remedy which is equitable in origin and function and must be tried in courts of equity as restitution has its origin in Statue. A test of conscience and fair dealing.

If a litigant takes the unequivocal position at the trial, they cannot at the appeal assume a contrary position, simply because the decision in retrospect was a mistake or perhaps candid but a regretted concession 981-F 2d 107.

Frankenmuth's stated position throughout the trial and in their Counterclaim was that they relied on Zahran's in the adjustment and payment of the claims.

They can't and should not be allowed to change that position now by claiming that reliance is not an element of their Counterclaim since the Appeal Court found that Frankenmuth did not rely on Robin Zahran. They can't have it both ways. Allowing Frankenmuth to change position at this stage would run contrary to law

and would prove the falsehood of their allegations all along.

The Supreme Court held that inconsistences produces a new trial. GALLICK V. BALTIMORE AND OHIO R.R., 372 U. S. 108 119 83 S. C. 659 666 9 L Ed 2d 618.

Frankenmuth denial of liability on specified grounds constitutes waiver and estoppel on their other defenses.

Frankenmuth engaged subsequently in conduct apparently incompatible with intention to void the policy, such as acceptance and retention of premiums or negotiation for settlement and paying on claims. OVERSTREET V. KENTUCKY CENTRAL LIFE INS. and AC AUKERMAN CO. v. V.R.L. CHARDIES CONSTRUCTION,960 F 2d 1020.

Acts by Frankenmuth disclaiming coverage on certain grounds but not others is conclusive evidence of insurer's intent to waive unassented grounds. STATE OF N. Y. V. AMRO REALTY CORP. 936 F 2d 1420 C. A. 2 (91).

2-(c) the rights of innocent insureds separately insured in an insurance contract.

Karen Zahran did not get involved with the adjustment of the claim whatsoever. She signed the proof of loss in total reliance on the presentations of contractors that were hired or contracted by Robin Zahran, the farm manager, and Frankenmuth adjustor's presentations.

Frankenmuth conducted discovery and deposed Karen Zahran. Karen Zahran was present throughout the trial and there is not a single word that would lend any kind of evidence that Karen Zahran committed any act of misrepresentation, concealment or fraud or as a matter of fact any act throughout the adjustment of the claim itself.

Finding that Karen Zahran committed the act of a fraud by the jury is simply wrong and goes to prove that the jury verdict was erroneous and was reached by unreasonable and unfair minded people.

A person can't be found guilty of a moral crime such as fraud or found to have committed an act without a proof or evidence whatsoever.

The only reason that Karen Zahran was found to have committed fraud is that she is married to a person who was born outside the United States and is of different national origin.

The Appeal panel comments that they could not see how Karen Zahran could be paid without benefiting Robin Zahran, is a clear evidence of the prejudicial behavior that Karen Zahran has been subjected to because she is married to Robin Zahran. The panel stated their reasoning. (Exhibit B-7 -B-8)

The panel's reasoning, as to Karen Zahrans innocence, is an outright obstruction of any rule of law and a clear violation of Karen Zahran's rights to due process of law and her individual rights as a person regardless of her marriage status.

Karen Zahran is insured by the policy

agreement individually and separately of Robin Zahran. Her rights are not contingent on Robin Zahran's actions as the insurance policy states.

Not that she wad any knowledge of wrong doing by Robin Zahran or that Robin Zahran misrepresented facts to fraud Frankenmuth, the panel ruling is clearly prejudicial against Karen Zahran because she's married to Robin Zahran which is unfair and wrong.

The panel decision went against the 7th Circuit published decisions as to the rights of innocent insured, in Mercantile Trust Co. v. New York Underwriters Ins. Co., 376 Fed. 2 502 and against other published decisions, to cite a few. Fidelity Phoenix Fire Ins. Co. of New York v. Queen City Bus and Transfer co., 3 Fed. 2d 784 4th Cir. A-Car and Co. v. Globe and Rutgers Fire Ins. Co. 158 MD 169 148 a 252. Home Ins. Co. v Cohen 357 S.W. 2d 674 676. Richardson v. Providence Washington, 38 misc 2d 593 237 N.Y. S 2d 893. The doctrine of these cases is approved

in five Appelman Law and Practice, 3594. Commonwealth Ins. Co. of N.Y. v. O'Henry Tent and Awning Co. of N.Y. 287 Fed. 2d 316 320 7th Cir.(1961) certiorari, denied, 368 U.S. 826 82 S.C.T. 45 7 LED 2D 30. All State Ins. Co. v. James, 845 Fed. 2d 315, 11th cir. Sales v. State Farm Ins. Co., 849 Fed. 2d 1383 11th cir., Kerr v. State Farm Casualty 552 Fed. Supp. 992. Dunn v. State Farm, 927 Fed. 2d 869, 5th cir. (1991) Hanes v. Hanover, 783 Fed. 2d 136. Hedtke v. Sentry Ins. 109 Wis. 2d 461 362 N.W. 2d 727 and many more. Adequate research has been made by Karen Zahran in that area and it's almost universal that innocent party receives what they paid and bargained for and their right to property should not be violated or taken away from them as it would be a violation of their constitutional rights. As they paid money in consideration for their insurance policy.

The policy had the mortgagee clause and their rights under the policy should not be

violated as well as they are insured under the policy.

Under the constitutional provisions prohibiting any state from passing any laws impairing obligations of contracts, Supreme Court has a duty of protecting from even legislative violations those contracts which constitution has placed beyond the legislative control, U.S.C.A. constitutional article 1 and 10, Trustees of Dartmouth College v. Woodward, 17 U.S. 518 4 Wheat 518 4 L Ed 269.

Mortgagee clause in fire polices created a contract of insurance between the mortgagee and insurance company and insurance company is obligated to pay the mortgagee, Aetna Ins. v. Kennedy to Use of Bogash, 57 S.C.T. 809 301 U.S. 389 81 L Ed 1177 and that is not any different than Frankenmuth obligation to Karen Zahran.

The U.S. Supreme Court explained Rule 56 C, a judgment should be entered against a party who fails to make a showing sufficient to establish

the existence of an element essential to that parties case and on which the party will bear the burden of the proof at trial. Celotex Corp. v. Catrett 477 U.S. 317 322 106 S.C.T. 2548 2552 91 Led 2d 265, (1986).

Frankenmuth failed to prove that Karen Zahran committed any act of misrepresentation and so their claims should fall and be dismissed as meritless.

Wisconsin common law prohibits an insurer from recovering payments absent a mistake of fact from insureds.

Defendant's assertion of fact in their pleading is a judicial admission by which it is normally bound throughout the course of the proceedings. SCHOTT MOTORCYCLE SUPP. v. AMERICAN HOWDER CO.,976 F 2d 58. They shouldn't be allowed to ask to rebuke their own pleading and recover payments.

Karen Zahran's rights as a separate insured under the policy cannot be disturbed by the

alleged acts of other insureds. In absence of specific findings that she committed the act of fraud as governed by Wisconsin and Federal Law as to elements of fraud governing these acts.

No reasonable jury could have found that she committed such acts and such findings.

The jury verdict was purely baseless and made by sheer surmise as Karen Zahran did not testify neither were any testimony by anyone that she committed these acts.

Policy provisions governing the condition of misrepresentation, concealment and fraud specifically state that, " (1) our obligations will not be affected by any misrepresentation or breach of affirmative warranties unless we rely on it and (a) it is material or (b) it is made with intent to deceive or (2) the fact misrepresented or falsely warranted contributes to the loss." (Exhibit N-1 - N-4) Nothing less could void Frankenmuth's obligation as the provision would be read from "it's four corners

of the policy."

Wisconsin Supreme Court held that rights of insureds are several, as well as their duties. HEDTKE v SENTRY INS. (i.d.)

2-(d) erroneous Jury Instructions by the Court.

The Court at Plaintiffs attorney's objection submitted a proposed Jury Verdict and Jury Instructions. The Court's clerk failed to inform the Judge of Plaintiff's lawyer's objection to the proposed special verdict. (Ex.A-1- A-5)

The clerk did not bring the special verdict form to the attention of the Judge until it was printed and handed over to the Jury and the Judge. The Trial Judge denied that his clerk ever showed him Plaintiff's objections of hand written notes on the special verdict before it was published. Attorney McConville submitted his affidavit to that effect in motions after verdict. (Record on file)

Jury instructions did not conform with

Wisconsin State Law expressed by the Supreme Court governing insurance contracts which reference misrepresentation, concealment and fraud. (Exhibit L-1 - L-2)

Discussion referencing the Jury Instructions and proposed verdict happened after the jury was deliberating. (Exhibit M-1 - M-7) The views of the Court as expressed was in contradiction to the special verdict form.

The judge stated that he hopes the jury will correct our mistakes and it maybe too late to do anything about the special verdict form as his law clerk did not discuss the special verdict with him.

The Judge continued that the evidence is not very compelling as to fraud, as he stated many times before and if the jury where to answer "yes", it will raise some interesting legal issues. The jury may have passed that question with two hours passed in their deliberation. (Exhibit M-1 - M-7)

When allegation of fraud are alleged, they must be proven at trial by all elements of fraud attributed to the party committing the fraud, per Fed. Rules of Procedures, 9 (b). (i.d) Here the trial Court did not issue instructions as to Karen Zahran and her alleged fraudulent acts separate from Robin Zahran.

3. Was the Circuit Court's decision in conflict with the laws of the Forum State and was it in conflict with well established published U.S. circuit decisions and more importantly, was it in conflict with the published decisions expressed by the U.S. Supreme Court.

Petitioners pointed out the conflicts of laws in cases cited between the 7th Circuit Order in this case and the published and established laws of the forum State of Wisconsin, expressed through Wisconsin Supreme Court rulings and statues, referencing:

1-(a) innocent insureds rights 2-(b) laws governing estoppel and restitutions and 3-(c)

effects of misrepresentation on policies.

The Circuit decision is in direct conflict with United States Supreme Court's published decision governing estoppel and restitution and evidentiary rulings as pointed out in the cited cases.

4. Whether Plaintiffs were deprived of:

4-(a) their rights to a jury trial on Defendant's counterclaim.

The 7th Circuit's panel decision directed the District Court to enter judgement not inconsistent with their opinion. (Exhibit B-23 - B-25) They disregarded the findings of fact of the District Court referencing the refusal of Defendants to submit jury instructions on their Counterclaim.

The petitioners demonstrated that the panel version contradicts other circuit decisions by citing a few controlling decisions from selected circuits. More importantly, the petitioners demonstrated that the panel's order is in

conflict with this Court's published decisions.

As stated earlier in this case, Frankenmuth did not want their counterclaim to be tried by jury and refused to offer jury instruction. There may have been a reason in that the jury would have recognized the element of reliance in the provision and found for Zahran. The jury misunderstood the policy provision and Frankenmuth did not want to bring it to their attention.

Appeal Court errored by directing the District Court to enter judgment on Frankenmuth's Counterclaim as it is contrary to Supreme Court rulings, in PENCE v. LANGDON, (i.d.) that they must seek compensations in damages and equity.

The 7th Circuit panel found that Frankenmuth did not rely on Plaintiff's misrepresentation, contradicting Frankenmuth's position in courts that they relied on Zahran's representations in the adjustment of the claim.

Here, we have four findings: The District

Court found that the misrepresentations were not material in lieu of their voluntarily payments. Although he affirmed the jury verdict for misrepresentation because R. Zahran signed two proofs of loss which Frankenmuth waived and dismissed Frankenmuth's Counterclaim, per Rule 49.

The jury verdict found that Zahran's misrepresented material facts of their claim including reliance. (Policy Provision Language and Verdict)

The 7th Circuit panel affirmed the jury verdict decision minus reliance and directed the Court to Void the policy and enter Judgment.

This Court has held that inconsistency and contradictions produces a new trial in GALLICK v. BALTIMORE & OHIO.(i.d.) The Appeal Court decision is wrong and without basis in fact or in law.

These petitioners have a Constitutional Right to be tried by a jury on Defendant's Counterclaim. The District Court ordered that

since Frankenmuth refused to submit jury questions, they waived their right to a trial by jury and dismissed their Counterclaim without prejudice.

The Circuit panel when it remanded the case to the trial court failed to recognize two elements: (1) there was no claim to enter judgment on as it was dismissed. (2) Just as important, Frankenmuth's Affirmative Defenses and Counterclaim alleged that they relied on Zahran's presentations in the adjustment of the claim of which they never amended before the case went to the jury or after.

Had they amended the counterclaim with no reliance, Plaintiffs could have had "their day in Court" on Frankenmuth's specific allegations and this Court has always held that a trial is not, "a blindsman's buff." It is the seeking of the truth.

The Appeal Court decision and order deprived Plaintiffs of their right to a jury trial on

merits, violating their constitutional rights.

4-(b) their right to be heard in their reply brief to Defendant's main appeal brief.

The Circuit panel stated that they will not consider points brought up in Plaintiff's reply brief as it wasn't brought up on the main brief.

Plaintiff's reply brief was their reply brief to Frankenmuth's main brief regarding their appeal on their counterclaim and should have been reviewed by the Appeal Court in its entirety but the Appeal Court chose not to hear the points brought up depriving Plaintiffs of their right for a review by the Appeal Court.

IN CONCLUSION

As demonstrated and cited in this petition for writ the Seventh Circuit is a decision in conflict with other decisions of other circuits including those of the 7th Circuit relating to innocent insures. The decision is contrary and in conflict with the Supreme Court of Wisconsin Rulings, the forum law of this case.

The decision did not recognize laws of estoppel of the forum state neither the published decisions of other U.S. Court of Appeals and created conflicts of laws.

That decision denied these petitioners their Constitutional Right to a jury trial.

These petitioners did not receive a fair trial in the lower court in violation of their rights under the 14th Amendment, to due process.

The Circuits decision sanctioned the lower court departure from supervising a fair trial and would require the interference of this Honorable Court.

Rights of innocent insureds to their property should not be forfieted to insurance carriers on mere allegations or baseless technicalities.

The issues raised by these petitioners as to rights and interpretations of insurance companies rights and obligations verses insureds rights and obligations in similar circumstances could create

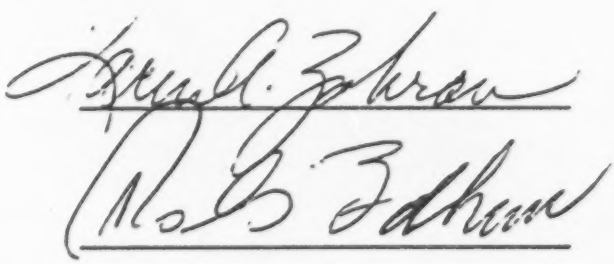
laws and presidence that would avoid and solve conflicts by this Court.

For these various reasons, the petition for writ of certiorari should be granted.

The posture of this case is the only opportunity for these petitioners to seek review of rulings of the Seventh Circuit Court of Appeal decision brought up in this petition to correct errors of judgment of Court below.

If the petitioners are correct that the Appeals Court rendered errors of judgment, petitioners pray this Court to remanded this case for a new trial with costs.

Respectfully submitted,



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OPINIONS, ORDERS, RELLEVANT MATERIAL

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EXHIBIT "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,

Plaintiffs, Case No. 900-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,

Defendant.

SPECIAL VERDICT

We, the Jury in the above-entitled case, having been duly impaneled and sworn to try the issues, find for our special verdict as follows:

QUESTION NO. 1:

Did the Zahran's violate the policy provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim?

Yes __X__ No _____

If the answer to the preceding question was "yes", you need not answer any of the following questions. If the answer was "no", please answer the following question.

Question No. 2:

Are the Plaintiffs, Robin and Karen Zahran, entitled to monies under the insurance policy as a result of the May 24, 1989 windstorm regarding the damage to their farm and/or personal property?

Yes _____ No _____

Question No. 3:

If you answered Question No. 2 "Yes," then answer this question:

What sum of money will reasonably compensate the Plaintiffs, Robin and Karen Zahran, for damage to:

a. Barn (Unit 151) $_____

b. Milk barn (Unit 152) _____

c. Grainery & milk house #154_____

d. Slurry tank (Unit 169) _____

e. Farm personal property _____

Question No. 4:

Did the defendant, Frankenmuth Mutual Insurance Co, at any time, act in bad faith in the handling of Robin and Karen Zahrans' claims resulting from the damage to their farm and/or personal property due to the May 24, 1989 windstorm?

Yes_____ No_____

Question No. 5:

If you have answered Question No. 4 "Yes," then answer this question:

What sum of money will reasonably compensate Karen and Robin Zahran for:

a. Farm business losses due to delay $___

b. Losses from Plaint. Ins. Bus. $___

Question No. 6:

What sum of money, if any, should be assessed against the Defendant, Frankenmuth

Mutual Insurance Company, under the circumstances of this case, as punishment in order to deter the defendant and others from offending in a like manner in the future?

$_____

We, the jury unanimously find the facts to be as indicated in our answers to the foregoing questions.

Dated this 26th day of December, 1991.

Foreperson _____ Juror

Juror _____ Juror

Juror _____ Juror

Juror _____

Members of the Jury:

If by your previous answers you are required to answer Question No. 5, you need not answer Question No. 5b.

signed (T. Curran)

Judge

(We understood the law clerk, as an extension of

the court, was to bring the matter to the courts attention.

Merits of Questions

(Void policy - When - as to which items -

(When -

(As to which items -

(Voluntary payments -

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN AND KAREN ZAHRAN,

Plaintiffs,

v. Case No. 90-C-337

FRANKENMUTH MUTUAL INS. CO.

~~DECISION AND ORDER~~

Robin Zahran and Karen Zahran, the Plaintiffs in the above-mentioned case, have moved the court for an order granting them a new trial or, in the alternative, for judgment notwithstanding the verdict. See Federal Rules of civil Procedure 550 & 59. In this action the Plaintiffs have sued Defendant, Frankenmuth Mutual Insurance Company, for breach of an insurance contract and for bad faith to pay certain casualty loss claims. On December 26,

1991, a jury returned a special verdict finding that the Defendant is not liable to the Plaintiffs because the Plaintiffs made material misrepresentations in their insurance claims.

Having reviewed the evidence in the light most favorable to the Defendant, the court concludes that the jury's verdict is not against the clear weight of the evidence. See M. T. Bonk Company v. Milton Bradley Company, 9455 FF.2d 1404, 1407 (7th Cir. 1991) (standard for new trial). Moreover, the trial was not unfair or infected by substantial error. Without weighing the evidence, the court finds that the verdict is supported by substantial evidence in the record. See Allen & O'Hara v. Barrett Wrecking, Inc., 898 F.2d 512, 515 (7th Cir. 1990) (standard for granting judgment notwithstanding verdict). Therefore, the court will not grant a new trial or judgment notwithstanding the verdict.

Defendant Frankenmuth has moved the court

for judgment on its counterclaim in which it alleges that the Plaintiffs are liable to it for misrepresentation, concealment and fraud in connection with their insurance claim. The company seeks $181,912.74, plus interest, costs and attorney fees for its injuries.

Although Frankenmuth demanded a trial by jury on its counterclaim, it failed to submit jury instructions or special interrogatories on the issues raised--even after the court specifically request that such instructions be submitted. Federal Rule of Civil Procedure 49 provides that if a party does not submit a special verdict question on a particular issue to the jury before the jury retires, that party is deemed to have waived the right of trial by jury on the omitted issue. After the verdict is returned, the court may make findings on that omitted issue. However, the Rule doesn't contemplate that the court would receive evidence

and testimony and hear argument on an issue after the trial is concluded and judgment has been entered. As the Plaintiffs point out the Defendant did not litigate the issue of whether it is entitled to restitution for amounts already paid out under the insurance policy at issue, so the Plaintiffs did not to have an opportunity to present a defense. There is evidence in the record that no proof of loss was required for the preliminary payments. Defendant's letter to the Plaintiffs, dated August 7, 1989, contains this statement: "As indicated above, these payments total $136,687.74. You will note that there is no Proof of Loss nor is there any release being required or requested for your negotiation of these drafts." In light of this statement the court believes that it would be unjust to enter judgment in favor of the Defendant on the counterclaim. Consequently, the court will not grant judgment to the Defendant, but will dismiss

the counterclaim without prejudice.

ORDER

For these reasons, the court order that the Plaintiffs' motion for a new trial or, alternatively, motion for judgment notwithstanding the verdict (filed January 7, 1992) IS DENIED.

IT IS FURTHER ORDERED that Frankenmuth's motion for judgment on the counterclaim (filed January 3, 1992) IS DENIED without prejudice.

IT IS FURTHER ORDERED that the judgment entered in this action on December 27, 1991, shall be amended to provide that:

This action came on for trial before the Court and a jury, Honorable Thomas J Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered it's verdict.

IT IS ORDERED AND ADJUDGED

that the Plaintiffs, Robin Zahran and

Karen Zahran, take nothing, that their action is dismissed upon its merits, and that the Defendant, Frankenmuth Mutual Insurance Company recover of the Plaintiffs

its cost of action;

IT IS FURTHER ORDERED AND ADJUDGED

that the counterclaim of Defendant, Frankenmuth Mutual Insurance Company, is dismissed without prejudice and without costs to any of the parties.

Done and ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 28th day of February, 1992.

signed

Thomas J. Curran

United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN AND KAREN ZAHRAN — AMENDED

V. — JUDGMENT IN A CIVIL CASE

FRANKENMUTH MUTUAL INS. CO. — CASE NO. 90-c-337

____ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by court. This action came to hearing before the court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiffs, Robin Zahran and Karen Zahran, take nothing that their action is Dismissed upon its merits, and that the Defendant, Frankenmuth Mutual Insurance Company recover of the Plaintiffs cost of action.

IT IS FURTHER ORDERED AND ADJUDGED: that the

counterclaim of Defendant, Frankenmuth Mutual Insurance Company, is Dismissed without prejudice and without costs to any of the parties.

signed

March 2, 1992

Sofron R. Nedilsky

D. McLeod

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN,

Plaintiffs,

v. Case No. 90-C-337

FRANKENMUTH MUTUAL INS. CO.,

Defendant.

ORDER

The court ORDERS that "Frankenmuth's Motion for Rule 54 (b) Findings" (filed March 25, 1992 is DENIED because it is moot. The Court entered its final judgment disposed of all claims and counterclaims raised in this action. Having dismissed Frankenmuth's counterclaim, the court does not contemplate any additional proceedings in this action. The Defendant may choose to refile its claim in a new action.

Done and Ordered in Chambers at the United

States Courthouse, Milwaukee, Wisconsin, this 26th day of March, 1992.

signed

Thomas J. Curran

United States District Judge

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

Chicago, Illinois 60604

Argued November 1, 1993

March 28, 1994

Before

Hon. **Walter J. Cummings**, Circuit Judge

Hon. **John L. Coffey**, Circuit Judge

Hon. **James B. Zagel** , District Judge*

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants/ Cross-Appellants	) Appeal from) the US Dist.) Court for the) East. Dist. of) Wisconsin
Nos. 92-1778 and 92-1848 v.	)
FRANKENMUTH MUTUAL INS. CO. Defendant-Appellee/ Cross-Appellant	) Thomas Curran) Judge)

ORDER

Robin Zahran and Karen Zahran insured their

farm buildings and property located in Denmark, Wisconsin. On May 24, 1989, a tornado struck the farm damaging barns and other equipment. Adjusting the claim was an arduous process and neither the Zahrans nor their insurer, Frankenmuth Mutual Insurance Company, were satisfied with the outcome. The Zahrans sued for over $537,000 for property damages and consequential damages, plus interest, attorney fees and costs. Frankenmuth eventually counterclaimed seeking to get back the $182,888.37 it had paid because, it said, the Zahrans willfully hid or misrepresented material facts about the claim in order to deceive Frankenmuth. Jurisdiction was based on diversity of citizenship, so Wisconsin law applies.

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*The Honorable James B. Zagel, District Judge for the Northern District of Illinois, is sitting by designation.

A jury decided against the Zahrans and, in a special verdict, ruled that the Zahrans transgressed the policy provision barring misrepresentation and fraud in claims. The district court entered judgment for Defendant, denied the Zahrans' post-trial motions and ordered them to pay Frankenmuth costs. The Zahrans appeal this. Frankenmuth, in turn, appeals the district court's dismissal, without prejudice and without costs, of the Frankenmuth counterclaim.

There is a lot of detail in the facts of this case, all of which we have examined, partly because the Zahrans, who had lawyers at trial, proceeded without counsel on appeal and sought to retry the case before us, even to the point of citing evidence which was stricken by the trial court. We spare any non-party who happens on this opinion the burden of reading them, and the parties need no further recital.

The Zahrans say the verdict was contrary to the evidence. This is a hard case to make. A reasonable basis for the verdict is all that is required. A jury may decide for a party with what, on the cold record, appears the weaker evidence. Trzcinski v. American Cas. Co., 953 F.2d 307, 315 (7th Cir. 1992)

-1- What Frankenmuth sought to show was that the Zahrans claim was unworthy of belief. The Zahrans said they simply secured repair estimates from reputable contractors to defeat Frankenmuth's estimates. They did not prepare the estimates (more precisely, they say they "did

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-1- There is a spat over whether Frankenmuth had to show that it relied on misrepresentations in order to defeat the Zahrans' lawsuit. Frankenmuth did not. Tempelis v. Aetna Cas. & Sur. Co. 473 N.W.2d (Wis. Ct. App. 1991), aff'd and modified on other grounds, 485 N.W.2d 217 (Wis. 1992) The spat is pointless because the Zahrans did not object to a jury instruction which excluded reliance as an element of the defense. Fed R. Civil P. 51, Sims v. Mulcahy, 902 F.2d 5524,525 (7th Cir. 1990)

not directly participate in (their) preparation") and, if there were misrepresentations in them, they are not be laid at the Zahran's door. Yet, Frankenmuth had evidence, which a jury could choose to believe, that Robin Zahran asked one estimator to quote, over the phone, a price for repairing one slurry tank ring and to do so without inspecting the damage; Robin Zahran then doubled the estimate and submitted a claim for <u>two</u> rings. On another occasion, Robin Zahran secured estimates of replacement cost from a seller of buildings who did not believe that replacement was necessary. A jury could infer that replacement cost rather than repair cost was used because Robin Zahran asked for it direction or implicitly.

Then there is evidence that total loss was claimed on barn 151 when Robin Zahran had an estimate for a much lower cost repair. When Robin Zahran claimed barns 152 and 154 were

damaged, which he did not do until September, 1989, nearly six months after the tornado, he said he had a written report from a structural engineer stating that barns 151 and 152 were unsound and total losses. This was untrue. A structural engineer did visit the barns, but did so in December, 1989 and never prepared a written report. There was evidence that barn 154 was undamaged. One contractor testified that when he was talking to Robin Zahran about how the big barn could be repaired, Robin Zahran told him "Stay out of it. I am going to get the insurance company to put me up a new barn . . .this is my showplace." Later Zahran called the contractor "several times a day any time of day" and threatened to sue him if he repaired the barn.

Robin Zahran also claimed that a slurry tank pump was damaged. Later he learned it was undamaged but never notified Frankenmuth to withdraw that claim. There were photographs of

the barns and the slurry tank which could have supported a finding that the tornado damage was not nearly so grave as the Zahrans claim. Finally, Robin Zahran was not a full-time farmer; he sold life and health insurance and annuities as his principal occupation. He may not have been an expert on property and casualty insurance, but he had made property loss claims for himself, and a jury could believe he was not an insurance naif.

There is clearly enough here for a jury to reach a decision against the Zahrans. -2-

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-2- The Zahrans argue they should not be treated as a collective entity. Whatever Robin Zahran may have done, there is no evidence that Karen Zahran did anything wrong. There are Wisconsin cases which allow an innocent insured to collect for damage intentionally caused by another insured. Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727 (Wis. 1982). Whether that doctrine would apply here is open to question, and we don't to have to answer. The Zahrans never presented this argument to the trial court during or after trial, never raised it in defense to the counterclaim, did not object to instructions referring to themselves collectively, and

We do not say the verdict was inevitable. The Zahrans had something to say in their favor on most of the incidents brought up by Frankenmuth. It was up to the jury to decide whom to believe and what inferences should be drawn from the circumstances of the case. There is no reason to believe that this jury, or any jury, would not give a farm owner a fair shake in a dispute with their insurance company.

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referred to themselves collectively in closing argument. There is , incidentally, a good reason why the innocent insured argument was not made. In Hedtcke, the court noted that the trial court would have the authority to see that the wrongdoer insured would not benefit from the proceeds; something easy to in Hedtcke because the guilty insured was hostile to the innocent insured and may have damaged the property to hurt her. (Judith Hedtcke, the innocent insured, had vacated the marital home, initiated divorce proceedings and obtained a court order directing Ronald Hedtcke to vacate the premises. Ronald, who later pled guilty to arson, burned the property three days before he had to vacate it). We do not see how it could be done in this case, and we suspect that the Zahrans' counsel also did not see how Karen Zahran could be paid without conferring some benefit on Robin Zahran.

The Zahrans rely on Omar Paper Stock Co. v. California Union Ins. Co. 262 N.W.2d 175 (Neb. 1978) which held that an insurance company is equitably estopped from asserting misrepresentation in proofs of loss where the insurance company failed to have an expert engineer of its own choosing appraise the damage. A Wisconsin court has cited Omaha Paper and observed that Nebraska, (and only Nebraska), unlike Wisconsin, requires an insurance company to show that it relied on misrepresentation in proof of loss. See Tempelis, 473 N.W.2d at 552. So we doubt that Wisconsin would adopt Nebraska's rule. And even if it did, it would mean nothing here for two reasons: (1) Frankenmuth did send its adjuster to examine the premises within days of the tornado and others came later, and (2) the Zahrans did not pursue the argument in the trial court, offered not instruction, and sought not

jury findings of fact which would support application of estoppel.

The Zahrans cannot prevail here on the argument that the verdict was wrong. But they do make further claims that the trial was unfair and they ought to have the matter retried. The special verdict form, say the Zahrans, misled the jury into believing that an overvaluation of one item in the proof of loss would void the whole policy. This objection was made at trial, but not until the jury retired to deliberate and the district court ruled, as it could reasonably do, that the objection came too late. This argument is waived. -3-

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-3- It is also unpromising since the insurance contract states, unambiguously, that the "entire policy is void" if "whether before or after a loss" the insured has willfully concealed or misrepresented any material fact or circumstance concerning the insurance or its subjects. In dicta the Court of Appeals of Wisconsin said that such a provision "clearly puts the insured on notice that (post-loss) representations made by them can serve to void

The Zahrans say the jury was allowed to equate innocent overvaluation with fraud. But the jury was told, without objection by the Zahrans, that "an exaggeration of value as mere opinion, a mere misstatement based upon an erroneous estimate of value, an honest mistake, an innocent overvaluation lacks the essential element of fraud and does not operate to void the policy." To find fraud a jury would have to find more than exaggerated opinion, erroneous.

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the policy." Tempelis v. Aetna Cas. & Sur. Co., 473 N.W.2d 5459, 554 (Wis. Ct App. 1991). This dicta was echoed, although with less force, when the Supreme Court of Wisconsin affirmed and modified the Court of Appeals Judgment. Tempelis v. Aetna Cas. & Sur. Co., 485 N.W.2d 217, 221-2. The Supreme Court also suggested that, where the misrepresentations covered a very small part of the claim, it might not enforce the contract provision, i.e., a fraudulent receipt for a $50 dinner might not void a $2,000,000 claim for the destruction of a home. That is not this case. And Wisconsin has not abandoned its rule that when faced with a clear insurance contract it will "merely apply" its terms according to their everyday meaning or policy definition. Kremers-Urban Co., v. American Employers Ins. Co., 351 N.W.2d 156, 163 (wis. 1984)

estimate, honest mistake and innocent overvaluation. This is fair. Indeed as to "exaggeration," one could read Lykos v. American Home Ins. Co., 609 F.2d 314, 316 (7th Cir. 1979) (Illinois Law), to say that the instruction was more than fair.

The Zahrans next assign error to several evidentiary rulings. Frankenmuth wanted to prove that it paid the Zahrans for a fire loss at barn 151 which occurred on July 6, 1990. The district judge ruled the evidence inadmissible. There might be an inference that the Zahrans were suing to recover for property damage for which they were later compensated. The evidence may have been admissible for just this purpose if the barn had not been substantially rebuilt after the tornado. But we do not know if this is so because the district judge permitted only brief reference to the matter on cross-examination and then only to impeach credibility. When Robin

Zahran testified, he was asked on cross-examination, without objection, whether he had made a fire loss for barn 151 in November, 1990. He answered a later question, again without objection or motion to strike, that "75 is not correct" and that "151 did not have $75,000 for what you're talking about." With the court's permission, Frankenmuth showed Robin Zahran a draft of $75,000 for the fire loss on barn 151, when he admitted receipt of payment for barn 151. That was the end of the matter. It was within the discretion of the court to permit this to impeach Robin Zahran's credibility in light of Zahran's denial of receipt. There is no error.

The Zahrans wanted to prove that Frankenmuth was considering making an offer of an additional $25,000 to "resolve (the_ entire matter." This, they argue, showed bad faith by Frankenmuth in making a "low-ball" offer. There are barriers to admission of this evidence. Thinking about an

offer is not the making of an offer and, if Frankenmuth did not actually make an unconscionable proposal, the evidence proves nothing but that one Frankenmuth employee had questionable thoughts on which neither he nor his employer acted. Rule 408 would exclude from evidence an offer, had it been made, as the district judge ruled. Most importantly, there was no assertion at trial that this evidence was being offered in support of the bad faith claim. In the end, all that the Zahrans' counsel said was "I'm offering it simply to show that an offer was conveyed to Mr. Mours (Frankenmuth's adjuster) by Mr. Spalding (Frankenmuth's claim supervisor)." This does not fairly advise the district judge of the purpose for which the evidence is offered, and so the Zahrans cannot complain of the failure to admit it.

At some point, the district judge limited each side's testimony. We do not find this

ruling in the record, but both sides agreed it was made and Frankenmuth does not dispute the Zahrans' assertion that the limit was nine hours. Both sides agreed the trial was going on longer than necessary. The judge may manage trials, and we do not intervene in the absence of unreasonableness. See Daniel J. Hartwig Assoc., Inc. v. Kanner, 913 F.2d 1213, 1222 (7th Cir. 1990). Were we more willing to intervene, we would not do so here. The district court noted that the "time allotted to the Plaintiff has long expired, and I would normally have cut you of except that it was cross-examination. The Defendants still have less than an hour left." The briefs filed here by the Zahrans evidence the need to cabin their presentations, and all that Robin Zahran was prevented from doing was to testify in rebuttal about a document already in evidence. His lawyer admitted "it's in the record. I think it's pretty well in the record.

I wanted to introduce the blowup for the jury for closing argument." Once over the ground was enough here. -4-

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-4- The Zahrans make other arguments that are not clearly stated or properly developed. (a) The slurry tank was listed in the policy under the heading "Coverage F - Out building, $500 deductible" and insured for $40,000 with a separate premium of $75. The Zahrans contended that they sought to collect only for damage to a portable part of the slurry tank under the blanket coverage for unscheduled personal property. The district judge refused to permit opinion evidence that the part was personal property; the witness was not qualified to give such an opinion and it made no sense to have a separate listing and premium for the slurry tank if it was covered as unscheduled personal property. We do not see how a jury could infer fraud from the court's ruling or its refusal to accept the Zahrans' interpretation of a contract. (b) The Zahrans say they were victimized by opposing counsel who knowingly used the perjured testimony of an engineer who said there was not damage to the slurry tank. But the Zahrans had the opportunity to bring out the defects in the engineer's testimony and, even now, they fail to show how the testimony is perjured (as opposed to mistaken). They simply point to Exhibit Q which is 20 pages of documents and photographs by an adjuster and tell us without analysis of the document, that this is the proof of perjury. We are not required to comb through these pages and speculate about what is or is not false. This particularly so where the adjuster says in the

Finally, there is Frankenmuth's claim that the district court erred in not granting judgment in its favor and, instead, dismissing its counterclaim of misrepresentation, concealment or fraud to enter judgment because Frankenmuth did not submit jury instructions or special interrogatories (even after the court requested that they be submitted) and did not litigate whether it was entitled to restitution for the amounts already paid out under the insurance

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Exhibit that the damage did not rally show up on the photographs but, with the naked eye, "it does appear as if there has been a twisting effect." This is hardly such unequivocal proof of actual damage that it puts the lie to any contrary opinion. The matter also was not included in the motion for new trial.

(c) The Zahrans complain of late production of documents and a videotape, but cannot tell us which documents they mean or how they were prejudiced by the delay in production. These documents, discovered in another case, are not part of this record. Both the district court and this court have denied the Zahran's motions to supplement the record.

(d) A number of claims are made for the first time in their Reply Brief and will not be considered by us.

policy. Federal Rule of Civil Procedure 49 says, in part, that when a court instructs a jury by special verdict or interrogatories and omits an issue off fact raised by the pleading or by the evidence, "each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Fed. R. Civ. P. 49(A). Frankenmuth concedes it did not tender a separate instruction for its counterclaim. Frankenmuth, however, says the special written finding that " the Zahrans violated the policy provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim" is a finding as a matter of law that the entire policy is void and entitles Frankenmuth to restitution of the proceeds paid out on the policy. Frankenmuth points to another part of Rule 49 which deems the court " to have made a

finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(A). But the district court noted it would be unjust for Frankenmuth to get restitution based on misrepresentations, concealment or fraud on proofs of loss which were not required for the preliminary payments of $136,687.54. -5-

"As a general rule, if the insurer pays a loss, being induced so to do by fraud, or by mistake as to facts which, if it had knowledge thereof, would have been a sufficient defense in an action by the insured upon the policy, the money so paid may be recovered." 18 COUCH ET AL., COUCH ON INSURANCE 2D S 74:191 (REV. ED. 1983); 6 J. APPLEMAN & J APPLEMAN, INSURANCE LAW & PRACTICE S 3979 (MISTAKE) (1972). "(I)f an obligation procured by fraud is paid voluntarily with a full knowledge of the facts, the amount

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-5- The Zahrans also sought reimbursement of an additional $20,274 paid out of the policy.

so paid cannot be recovered." 66 AM. JUR. 2D SS 116 & 122 (Restitution and Implied Contracts) (1973). One could argue that, under these basic principles, Frankenmuth is not entitled to recoup monies paid out on the policy where it did so voluntarily with knowledge from its own experts and investigators of the actual property damage sustained and when, after suspecting fraud, it refused to make further payments. The Zahrans actually suffered some of the losses claimed, and it would appear just to compensate them for those losses. But Frankenmuth does not base its right to recover on equitable principles. Rather, it seeks restitution based on the plain language of the policy, and we should not be motivated solely by a yearning to see insured who pay premiums and suffer actual losses collect insurance. -6-

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-6- See American Home Fire Assurance Co. v. Juneau Store Co., 78 F.2d 1001, 10003 (7th Cir. 1935) ("court (interpreting Wisconsin Standard Fire Insurance Policy) should () unhesitatingly

Given that the jury found a violation of the clear policy provision voiding the entire contract where fraud exists, we can conclude only that the district court erred in denying Frankenmuth the benefit of its bargain and refusing to enter judgment in favor of Frankenmuth on its counterclaim. The Zahrans bargained for the policy and were on notice of the harsh penalties for fraud. They cannot now reasonably claim injustice from mere application of its terms. Moreover, there is very little point to requiring Frankenmuth to file a new lawsuit, the result of which is inevitable given

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act to prevent attempted frauds on the part of the insured" even though penalty of voiding entire policy is "heavy and seemingly harsh"). The Juneau court, however, could not enter judgment in insurer's favor because of inconsistent jury verdict. See also Tenore v. American & Foreign Ins. Co., 256 F.2d 791 (7th Cir. 1958) (following Juneau, court held insured could not recover any sum under Illinois policy where provision voided entire policy in case of fraud or false swearing, despite fact insurers did not pay out money and were not deceived by insured's claims).

that the only operative and contested fact has been found in its favor and against the Zahrans.

The district court's order and judgment entered on the jury verdict in favor of Frankenmuth is **AFFIRMED.** The dismissal of Frankenmuth's counterclaim is **REVERSED AND REMANDED** for entry of judgment not inconsistent with this opinion.

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN AND KAREN ZAHRAN,

Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL INSURANCE CO.,

Defendant.

ORDER

Based upon the mandate issued by the United States Court of Appeals for the Seventh Circuit in the above-captioned case, the Court ORDER that the judgment entered in this case on February 28, 1992, is AMENDED by vacating that part of the judgment which provides that:

> IT IS FURTHER ORDERED AND ADJUDGED that the counterclaim of Defendant Frankenmuth Mutual Insurance Company is dismissed without prejudice and without

costs to any of the parties.

The judgment, as amended, shall provide that:

> This action came on for trial before the Court and a jury, Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,
>
> IT IS ORDERED AND ADJUDGED that the Plaintiffs Robin Zahran and Karen Zahran take nothing, that their action is dismissed upon its merits, and that the defendant Frankenmuth Mutual Insurance Company recover of the plaintiffs cost of action:
>
> IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Frankenmuth Mutual Insurance Company recover of the Plaintiffs Robin Zahran and Karen Zahran the sum of One Hundred and Eighty-Two Thousand, Eight Hundred and Eighty-Eight Dollars and Thirty-

Seven Cents ($182,888.37) with interest thereon form the date of entry of judgment at the rate provided by law.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 29th day of June, 1994.

signed

Thomas J. Curran

United State District Judge

EXHIBIT "C"

FRANKENMUTH MUTUAL INSURANCE COMPANY

One Mutual Avenue, Frankenmuth, Michigan 48787

517-652-6121

August 7, 1989

Robin or Karen Zahran

718 Acorn Hill Lane

Oak Brook, Illinois 60521

Re: Our Insured: Robin or Karen Zahran

Date/Loss : 5/24/89

Our claim #: 89-10267

Policy No. : FR 0423155

Dear Robin or Karen Zahran:

This letter is a follow-up to the personal visit and many phone conversations that I have had with Mr. Robin Zahran in regard to the wind loss suffered by barns, silos and farm personal equipment on the date in question. Although I am certainly aware that disputes still remain, I am confident after personally inspecting the damaged insured property, and having had a further

opportunity to review the various estimates which have been prepared to assist in the determination of the loss of value of the various damaged insured farm property, that I can properly pay and indemnify you for your loss at this time.

To this end, I am forwarding to you various drafts made payable to yourself and the various parties at interest totaling $136,687.74.

An explanation and breakdown of the payments is as follows:

1. A total of $26,609.99 is enclosed for damage to various farm personal property including your cows and also including a $2,000.00 allowance for cleanup. Attached to this letter is a breakdown on your farm personal property damages.

2. For your barn which is delineated as No. 153 on your policy, enclosed is a payment for $75,000.00 which represents a total policy limit of $100,000.000 on this barn minus the $25,000.00

advance payment that was made.

3. For silo delineated as No. 156, I am enclosing a payment of $5,351.66 pursuant to my inspection and agreed price with the repair facility.

4. For silo No. 157, I am enclosing a draft for $5,351.66 pursuant to my inspection and agreed price with the repair facility.

5. For silo delineated as No. 158, a payment is enclosed for $5,351.66 again representing my estimation and agreed price of the damages.

6. I am enclosing $14,973.77 for damages to the barn delineated as No. 151. This includes a $6,473.33 allowance for the vent system.

7. A payment for $4,000.00 is enclosed for barn delineated as No. 152.

As indicated above, these payments total $136,687.74. You will note that there is no Proof of Loss nor is there any release being

required or requested for your negotiation of these drafts.

It should be made, however, clear to you that this is my estimation of your total loss and damages in this case.

As a fiduciary for all insured who entrust their premium money with us, we must observe reasonable standards of proof of damages.

In making this payment, I do not waive any of the rights and defenses which Frankenmuth Mutual Insurance Company possesses under Policy No. 0423155.

Very truly yours,

signed

WILLIAM E. CONAWAY

General Adjuster

WEC/gw

Enclosures

ADJUSTER PROPERTY LOSS REPORT

FRANKENMUTH MUTUAL INSURANCE CO.

INSTRUCTIONS: Complete this report on all Property claim numbered tiles. Should be received at Home Office within 7 working days following assignment.

Policy # FR 0423155 Claim No. 89-10267

Insured Zahran Date of Loss 5/24/89

Form No. FO-3 Date Assigned to adj__

Deductible $500.00 Reserve Amounts _____

Check list: yes photos & diagrams

no questionable coverage

no other insurance

Cause & Origin: Tornado

Subrogation: None

Scope of loss: 5600 S. F. barn is down, roof damage on L. hay section, block wall & milk parlor, shook up and damaged. Silo caps damaged, mason damaged, elevator, debris in crops, fans damaged.

Telling estimate on barn, new part of barn only three year old.

Remarks: _____

Date of Report 6/12/89

Adjuster signed (Conaway)

Conaway phone conv. & notes w/Forest Constr.

Robert Nimmer 86-1

Forest Const.

414-845-2302

414-866-2612 (home call early)

Re: Ins. Robin Zahran

Call him early in A.M. 6:00 A.M. ok

VERY IMPORTANT

Some additional bldg may collapse due to the current condition. Walls are off foundations and end wall is off barn.

Some temporary measures should be taken to protect property. He would be happy to prepare an estimate (detailed) to make repairs. But if his figures will be used to settle claim he'd like to be paid for it I don't have a problem with that.

He says you told him he had a $260,000 claim (wrong more like $80,000.00 WC)

EXHIBIT "D"

AMERICAN STRUCTURES, INC.

Menomome, Wis 54751

715-235-4225

August 7, 1989

William Conaway

Frankenmuth Mutual Insurance

1 Mutual Avenue

Frankenmuth, Mich 48787-0001

Dear Mr. Conaway:

Enclosed please find pictures of tank labeled A, B, C, D, and E with notation on each. I left Menomome at 9:15 a.m. and arrived at Acorn Hill Dairy at 2:30 p.m. to look at manure tank.

The tank is approximately 3/4 full of manure and is not leaking or ruptured but does show signs of severe stress. It seems the structure took some severe blows to the north-northeast side, creating stress bends to the north and east portions of steel. I'm not sure of my directions

so I'm calling east the road that runs perpendicular to the driveway to farm. The manure in the tank I feel is helping to hold it round and thus not allowing the bends or dents to be fully exposed. It is very apparent that the structure has been severely wrecked and it's structural integrity is in my judgement in question.

Picture A shows the top angle and sheet to be bent. This was taken almost due east.

Picture B shows the top ring to the right of the man way to be pushed in as if by a severe impact.

Picture C shows the dents in rings one and two to be very pronounced.

Picture D shows that top angle part of the second ring leaning some towards the barn.

Picture E shows the stress related marks on the west side of the tank, possibly struck.

After looking at the tank and considering it to

be 3/4 full and looking at what happened to other buildings in the area I would not feel comfortable saying the tank would or will be okay for it would be purely conjecture on my part. If the tank were empty, dents, buckles, and further wracking may occur but at present I feel the manure is probably a stabilizing factor.

Sincerely yours,

signed

Earl W. Wildenberg

EWW/pjb

Enc. Pictures, invoice

EXHIBIT "E"

GAB Business Services, Inc.

220 N. Madison Street

PO Box 338

Green Bay, Wisconsin 54305

414-437-6501

414-437-0762 fax

Service Location

DATE: 10/13/89

RE: ROBIN ZAHRAN

TO: BOB SPALDING

FRANKENMUTH MUTUAL

517-652-3588

We are sending the following 2 page(s), not counting this page, to you by facsimile. If you do not receive all of these pages, please call at (414) 437-6501.

Thank you,

Sincerely ,

GAB BUSINESS SERVICES, INC.

BY: SIGNED (L. Mours)

Comments: Bob - Here is Bldg. Doctor's report. Don't be concerned about it's appearance. This is standard. He's an excellent man and court tested.

signed (Larry)

ORVIL KRUEGER

BUILDING DOCTOR

"WE STRAIGHTEN BUILDINGS"

715-754-5495 Rt. 2, Marion, Wisconsin 54950

Roofing, Siding Cementing, Masonry, Chimneys

Brand new or repair, Additions, Install Windows,

Gardner Barn Equipment

Proposal submitted to: G. A. B.

P.O. Box 338

Green Bay, Wisc 54305

Date: October 9, 1989

Job Name: Robin Zahran

Street: Rosecrans Road 184222

City: Maribel, Wisc

We hereby submit specifications and estimates for: Repair of hay loft, also Barn above Milkhouse and to repair mortal joints in new addition. We will install 5/8" rods across above 6 beams, also 2 rods from one part to the other.

Diagonal rods across and length wise to stop the leaning and twisting.

Repair beam picture 13 and odd support tie in end wall picture 15 using rods. Install all braces that are missing picture 11 etc. Labor and material this far $5,274.00.

Now see picture.

If we pick this side only and pull this in add $1,000.00. If we have to junk the entire end of barn add $10,000.00. All work areas must be empty to do this work. This to be done by others.

We propose to furnish labor and materials - complete in accordance with the above specifications, for sum of_____ dollars ($_____) with payment to be made as follows: To receive one half of total down when work is started, balance on day of completion.

All material is guaranteed to be as specified.

All work to be competed in a workmanlike manner

according to standard practices. Any alteration or deviation from above specifications involving extra costs, will become an extra charge over and above the estimate. All agreements, contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by workmen's Compensation Insurance.

Authorized Signature __signed__ Orvil Krueger

Note: This proposal may be withdrawn by us if not accepted within 60 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.

ACCEPTED: **SIGNATURE**_____

DATE:_____ **SIGNATURE**_____

My observations of the barn of Robin Zahran

1: Shows that the barn is hanging over the side wall. Also the barn is leaning endways. I am told this is from the wind, but I question this because on the other side of the barn inside does not show that it moved, there is nothing showing of cracked or moved white wash to indicate damage.

2: Barn is leaning endways.

3: Sideway.

4: Crooked from one end to the other.

5,6: The roof has dips and humps.

7: Going into the barn picture 6 looking up to the right. The anchor cable is not where it can do any good. It should be at the top post.

8: Same location, this kind of bracing does to do any good. There are at least 12 or more storm braces missing, See: 9, 10, 11.

12: Brace missing, roof shifting of post, beam rotted off and not properly supported. See: 13.

14: There are no perline to support these long rafter, the cross beams are down about three feet from top of post so there for this caused the post to bow out from the weight of the roof. I recommend to install 5/8" rods across at the top of these post from one side to the other to stop spreading the end wall (same building) above milkhouse. This needs rods to anchor the wall from bowing out. See: 15.

The lumber that was nailed on cannot hold this as the spikes will pull out.

I recommend that rods be installed across the barn above each beam, diagonally rods on the side walls to correct leaning. Anchor rods to hold the end from bulging. Diagonal rods in center of barn to stop leaning. Also rods from across one perline to the other, this will pull the roof together an straighten the top ridge. Then on the new addition, chip out old motor and remoter joint that have cracked.

The old barn needs all the storm braces installed that are missing. It can be jacked and shifted back in line, it is possible spread and would require anchor rods to hold it together.

G. A. B.

Report : Third Date: 11-09-89

Fax #414-437-0762, P. O. Box 338, Green Bay, Wi 54305 Telephone # 414-437-6501

Insured: Zahran, Robin GAB File No.557611-50901

Policy No. FR 042315

FRANKENMUTH MUTUAL INSURANCE CO.

ONE MUTUAL AVENUE

FRANKENMUTH, MI 48787-0001

Location of Claim: Denmark, Wi

Type of Claim: wind damage

Date of Claim: 05-24-89

CAUSE OFF LOSS

Loss is the apparent result of catastrophe No. 94 wind storm.

ADJUSTMENT

What Has Been Done

This report is issued as a follow-up to a telephone conversation which I had with Mr. Spalding on Wednesday, November 8th.

On Tuesday, November 7th Joel Portmann stopped at my office. He did not have a formal report in hand covering his inspection of the liquid manure storage tank. He noted that he had photographs which would be developed and provided. He promised to provide a written repair proposal.

As discussed with Mr. Spalding, Portmann can not say one way or the other if the liquid manure storage tank was damaged by wind. He believes that the top 1/4 section of the tank was filled with liquid manure at the time of the wind storm, thus he believes it is structurally sound. He did not find any evidence of stretched panels nor damaged concrete/base.

He told me that the top 1/4 section of the tank is definitely out of round. He will have to remove the top retainer ring and reroll. The angles will be straightened and splice angles will be installed for support. His price quote is as follows:

Replace 28 splice angles @ $80 each	$ 2,200.00
Realign 28 angles @ $58 each	1,624.00
Two weeks repair labor for six men	8,000.00
Sub-total	$11,864.00
Overhead and profit	2,136.00
Total estimate	$14,000.00

Pekay Silo Specialists, Inc.

W4840 Quinney Road

Chilton, Wi 53014

414-849-2021

Purchaser's name: Robin Zahran

Phone : 708-573-1000

Date : April 26, 1991

Directions to Farm: S. of Denmark

EQUIPMENT DESCRIPTION:

Construct Preowned Harvester Slurry Tank Approx Size 20 x 81 Install Concrete Floor Install Agitation Equipment and Existing Pumps Including Delivery All Foundation & Construction Labor Nuts, Bolts, & Labor Foundation parts

5 yr warranty on workman supplies

Complete $77,000.00

Buyer supplies concrete fill

Terms of Payment: 50% w/contract, 30% w/delivery, 20% on completion

Warranty: 5 yrs warranty on Structure workmanship

EXHIBIT "F"

MR. FITZPATRICK: If you understand the question and you can answer it.

THE WITNESS: I lack sufficient detail to answer that question.

MR. ZAHRAN: Q. To your best knowledge, sir?

MR. ZAHRAN: Let the record reflect we have been asking that question for two minutes.

THE WITNESS: To the best of my knowledge, are the representations on the sworn statement of proof of loss executed by Robin and Karen Zahran such that I would have evidence that they deliberately made any false representations? The answer to that is no.

MR. ZAHRAN: Q. Thank you. Do you know of anybody that would know there is false representations on this proof of loss?

A. I'm not aware of anyone.

Q. Thank you.

A. Who has such information.

Q. Thank you. I show you--

MR. ZAHRAN: Would you mark that? (Whereupon said document was marked as Harmon Deposition.

EXHIBIT "G"

November 2, 1989

Mr. Robert Spalding

Frankenmuth Mutual Insurance Co.

One Mutual Avenue

Frankenmuth, Michigan 48787-0001

re: Robin and Karen Zahran

Claim No: 89-10267

Date of Loss: 5/24/89

Policy: #FR 0423155

Dear Mr. Spalding:

You have previously received from me the appraisal from Morton Builders, to restore the barns to their original condition as to before the tornado, in excess of $140,000.00 which does not include electrical work, block wall repair and extra charges to cap barn wall with concrete.

Since Mr. Orvil Krueger has submitted to G.A.B. and you a proposal contract to restore the barns to their original condition as to before the tornado for $5274.00 and there is not way the

figure from Morton Builders comes close to Mr. Kruegers proposal, please fix the barns immediately as we are in the Winter season already and you secured a contract with Mr. Krueger to do so.

Again, I state that the buildings must be restored to their original condition as to before the tornado. Absolutely nothing less than that condition will be acceptable.

Sincerely,

signed

Robin Zahran

P.S. Morton Builders will adjust the $140,000.00 because that actual sq. footage is greater than they originally based their appraisal on.

FRANKENMUTH MUTUAL INSURANCE COMPANY

ONE MUTUAL AVENUE, FRANKENMUTH, MI 48787-0001

517-652-6121

October 9, 1989

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Robin or Karen Zahran

c/o Robert J. Doig

Attorney at Law

1301 W. 22nd Street

Suite 714

Oak Brook, Illinois 60521

Re: Our Claim : #89-10267

Date/Loss : 5/24/89

Policy No : Fr 0423155

Dear Robin or Karen Zahran:

We have received from you two papers which purport to be Proof of Loss under policy number FR 0423155 in connection with an alleged loss of 5/24/89.

We are hereby returning these documents to you

and expressly rejecting them as a proper Proof of Loss since they do not comply with the provisions of your policy of insurance with the Frankenmuth Mutual Insurance Company.

Your attention is directed to the following defects in the purported Proof of Loss:

A Proof of Loss which was dated on the 25th of July 1989 has been subsequently superseded by subsequent Proof of Loss which was received at the Home Office of Frankenmuth Mutual Insurance Company on the 11th of September 1989.

The reasons for the rejection of the Proof of Loss received on September 11, 1989 include the following:

a. The items and amounts claimed are not validated or documented by any documentation.

b. The amounts claimed in many of the cases have already been paid.

c. Various articles claimed are in amounts in excess of the applicable coverage.

Any other Proof of Loss that may be filed by you will be considered an entirely new documents and will be accepted or rejected solely in connection with the matters and items contained therein. I would now like to address some of the issues that have arisen during our various phone conversations, issues that have been presented in some of the correspondence which you have forwarded to this office and which now remain a permanent part of our claim file to used as deemed necessary, and also the personal meeting that we had here at the Home Office of Frankenmuth Mutual Insurance Company on the 18th of September, 1989. On the Issue of the diesel tank and repair, my discussions with Uni-pump leave me to believe that the amount originally allowed by Mr. Conaway was correct.

The amount originally allowed on the chopper boxes in the amount of $5,000 is correct.

The claim for gutters is an amount as I explained

to you at the time of our September 18, 1989 meeting had already been paid for and had been included in the various estimates that have been submitted.

The $2,000 in clean up charges was for clean up of contents and the correct amount allowed in view of the policy limits, which had previously been paid on Barn 153. The shingles, which you are claiming $3,900 for, again had already been paid for during the repairs to Barn 151.

The amount allowed for the ventilation system is very generous in view of the limits having already been paid on Barn 153 and the $6,473.33 does represent a fair amount and has been paid.

As far as the manure tank is concerned, Mr. Earl Wildenberg did not indicate that his estimate of $79,000 was necessarily what needed to be done in order to remedy any problems with the tank. This is to further advise that the tank in question is only covered for $40,000 and although you have

made a claim for $15,000 for a pump, you have supplied no documentation to indicate that there is anything wrong with this pump and Mr. Wildenberg indicated that it does not need to be replaced. I have made arrangements for someone in your locale to reinspect the slurry tank to give us further insight on any problems, if any. As for the $4,628 Brown Electric bill, as I advised you on September 18th, this amount had already been covered in the $100,000 payment for Barn 153.

The conveyor which you have referred to both in writing and at the time of our meeting was not damaged according to our inspection.

You have submitted estimates for the replacement of 24 x 40 barn. As you are aware, in studying your policy, we do not insure a 24 x 40 barn, however, this in all likelihood was to be considered as a part of barn 151, which is the wooden two story barn. You have also submitted

estimates for the removal and the replacement of this barn. Our inspection of that barn, including the 24 x 40 addition, has convinced us that this barn can be repaired. As soon as I have the repair figures, I will supply them to you immediately, and I am obviously also willing to immediately pay you for the cost of these repairs.

You have also submitted estimates and made demand for payment for the removal and replacement of the roof of your 40 x 170 warming house. Our reinspection of this barn leads us to believe that there is no damage which needs attention or repairing.

You have made further claim for additional cows which were allegedly destroyed in the tornado. You have supplied us with absolutely no documentation for these cows. May I remind you that we have already indemnified you in the amount of $4,400 for the death of four cows.

Let me assure you Mr. Zahran that should I become in the possession of objective information which would require the further indemnification of yourself under the policy of insurance in question, that I will promptly do so.

Either party to the Insurance contract has a right to have remaining disputes resolved through appraisal.

Very truly yours,

signed

Robert C. Spalding, C.P.C. U.

Property Claim Unit Manager

RCS/js

Dict. 10/5/89

FRANKENMUTH MUTUAL INSURANCE COMPANY

ONE MUTUAL AVENUE, FRANKENMUTH, MI 48787-0001

517-652-6121

October 18, 1989

Robin or Karen Zahran

c/o Robert J. Doig

Attorney at Law

1301 W. 22nd Street

Suite 714

Oakbrook, Illinois 60521

Re: Date/Loss: 5/24/89

Claim No : 89-10267

Policy No: FR 0423155

Dear Robin or Karen Zahran:

I am enclosing at this time a copy of the report and estimate as submitted by Mr. Orvil Krueger pursuant to the damage to both your wood, two-story barn delineated as barn No. 151, and also as it pertains to damage to the warming barn or barn No. 1552.

As you can see in Mr. Krueger's observations, he does feel that part of the damage to your barn is not wind related and refers specifically to the situation where the barn is hanging over the sidewall and also leaning end-ways. You can see in his observations the reason that he questions this.

Further, you can see where he is estimating that he can repair the wind damage to the wood two-story barn and also do some minor masonry work to the warming barn for a total of $5,274.00.

The remaining work for what Mr. Krueger feels is not wind damage, can be completed possibly for $1,000.00 if all he has to do is jack one side of the barn and possibly as much as $10,000.00 if he has to jack the entire end of the barn and anchor it together.

Although Mr. Krueger does not feel that the additional $1,000.00 or additional $10,000.00 is necessary to correct wind damage, in order to

give you the benefit of $6,274.00 to represent the $5,274.00 for wind damage to both the wooden two-story barn and the warming barn and also the $1,000.00 that may completely correct the other problems referred to.

You are free, of course, to hire anyone of your choice in order to have these repairs completed including, of course, Mr. Krueger. It is, however, your responsibility to see that the repairs are made and Frankenmuth Mutual Insurance Company cannot undertake directly any repairs to your property.

I hope by now that we have had an inspection completed on your slurry tank and as soon as I receive the results of this inspection, I will be back in touch with you immediately.

Very truly yours,

signed

Robert C. Spalding, C.P.C.U.

Property Claim Unit Manager

RCS/cs

Dist. 10/16/89

FRANKENMUTH MUTUAL INSURANCE CO

ONE MUTUAL AVENUE, FRANKENMUTH, MI 48787-0001

517-652-6121

November 8, 1989

Robin or Karen Zahran

718 Acorn Hill Lane

Oakbrook, Illinois 60521

Re: Date/Loss: 5/24/89

Claim No : 89-10267

Policy No: Fr 0423155

Dear Robin or Karen Zahran:

With this correspondence I will confirm receipt of two Faxed letters both under the cover of November 2, 1989 on this particular matter.

In regard to the question of appraisal, I am enclosing with this correspondence photocopies of the Appraisal Section of your policy. As you can see, demands for appraisal must be made in writing and, likewise, the naming to the appraiser must be in writing.

As I have explained to you in the past, it is the position of Frankenmuth Mutual Insurance Company that they have indemnified you for your loss of May 24, 1989. Should you disagree with the amount of indemnification that you have received, please advise Frankenmuth Mutual Insurance Company in writing of your wish or demand for appraisal and also advise us of your appraiser. We will then respond accordingly pursuant tot he contract.

As to the issue on Barn No. 151, you were advised under cover of October 18, 1989 of exactly what was wrong with your barn both of a wind and non-wind nature and also advised in writing of what should be done to correct and rectify the situation. It is now your responsibility to see that what is necessary to repair the barn in question is done as quickly as possible. Failure to do so should further damages occur and should these damages arise out of your failure to have

the repairs made as delineated could seriously jeopardize your insurance coverage. You have also been paid to have these repairs done.

As has also been explained to you previously, Frankenmuth Mutual Insurance Company does not undertake repairs. Our contractual obligations to you are to indemnify you for loss. We do not, however, undertake direct repairs of damaged property. That remains your responsibility. Neither Frankenmuth Mutual Insurance Company nor the General Adjustment Bureau has entered into any contract for repairs with Mr. Orvil Krueger. Mr. Krueger's proposal was submitted to the General Adjustment Bureau.

You have advised me that Mr. Krueger does not wish to repair your barn. I am sure there are other barn repair people who may be interested in repairing your barns along the lines that Mr. Krueger has proposed. As I am sure you are aware, the previous proposals that you have given

us from the Morton people have nothing to do with repairing your barns but simply to rebuild new barns. In view of an experienced barn builder's opinion on repairs such as Mr. Krueger has given us, the Morton proposals are unacceptable. I am also convinced that Mr. Krueger's proposals in regard to the repairs of your barns is legitimate and will stand up to any technical scrutiny.

I trust that makes our position clear.

Very truly yours,

signed

Robert C. Spalding, C. P. C. U.

Property Claim Unit Manager

RCS/cw

Dict. 11/6/89

Enc.

FRANKENMUTH MUTUAL INSURANCE COMPANY

November 10, 1989

Robin or Karen Zahran
718 Acorn Hill Lane
Oak Brook, IL 60521

RE: Date/Loss 5/24/89
Claim # : 89-10267
Policy #: FR 0423155

Dear Robin or Karen Zahran:

This letter will follow up my telephone conversation with Robin Zahran of November 9, 1989. At that time, I indicated that I had received a telephone report from the General Adjustment Bureau Adjuster, Mr. Mours, detailing to some extent his understanding of the inspection results of the slurry tank in question as completed by Mr. Joel Portmann. I have not received Mr. Portmann's written appraisal or proposal, but will, of course, forward to you a copy once I receive it.

In the meantime, Mr. Mours has prepared a report on GAB, which reflects to the best of his ability

the total results of his personal discussions and conversations with Mr. Portmann.

I am enclosing a copy of this report with this correspondence, and as you can see, although there is some question as to causation (wind or non-wind), Mr. Portmann has estimated and proposed that he can repair the slurry tank in the amount of $14,000.00.

Accordingly, I am enclosing a draft in the amount of $14,000.00, made payable to all parties of interest, to be used as you see fit, but hopefully, to be utilized in the repair of the slurry tank in question.

As I have advised you in past correspondences, it will be your responsibility to effect the repairs of the damaged property. Frankenmuth Mutual Insurance Company can only indemnify you for these losses and cannot directly undertake the repairs.

I do not know whether Mr. Portmann is willing to contract with you to effect these repairs.

In making this payment, Frankenmuth Mutual Insurance Company does not waive any of their rights and defenses which Frankenmuth Mutual Insurance Company possesses under policy number FR 0423155.

Very truly yours,

signed

ROBERT C. SPALDING, C.P.C.U.

Property Claim Unit Manager

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and

KAREN ZAHRAN,

Plaintiffs,

NO. 90-C-337

vs.

FRANKENMUTH MUTUAL

INSURANCE COMPANY,

Defendant.

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS - FIRST SET

TO: FRANKENMUTH MUTUAL INSURANCE CO.
C/O Attorney James M Hoey
Clausen, Miller, Gorman, Caffrey & Witous
10 S. LaSalle Street
Chicago, Illinois 60603-1098

Pursuant to Rule 34, Federal Rules of Civil Procedure, produce all documents requested below for inspection and photocopying at the law offices of Borgelt, Powell, Peterson & Frauen, S.C., 735 North Water Street, Milwaukee, Wisconsin at 10:00 a.m. on the 5th day of November, 1990.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All files of Frankenmuth Mutual Insurance Company involving claims of Robin and Karen Zahran.

2. All underwriting files of Frankenmuth Mutual Insurance Company pertaining to insurance policies issued to Robin and Karen Zahran.

3. All agent's files pertaining to Robin and Karen Zahran.

4. All claims manuals, claims and procedures' guides or similar documents which govern the handling of tornado, wind damage and

fire insurance claims with Frankenmuth Mutual Insurance Company.

5. All documents, reports, notes, memorandum or other intangible things on which you rely to support the level of payment you have made or offered for each of the following items:

(a) Two-story Barn (Unite 151);

(b) Barn No. 2 (Unit 152);

(c) Barn No. 3 (Unit 153);

(d) Milk House and Bulk Tank (Unit154)

(e) Slurry Store (Unit 160);

6. All reinsurance treatises, reinsurance policies and insurance policies issued to Frankenmuth Mutual Insurance Company potentially applicable to the claims of Robin Zahran arising out of the tornado of May 24, 1989 and the fire of July 6, 1990, including claims for bad faith made in this lawsuit.

7. Al memos, notes, letters and writings of any kind concerning plaintiffs' claims,

plaintiffs' policy or plaintiffs' policy history.

8. Any agent's or policyholders' protests or interoffice memos regarding the handling of plaintiffs' claims or any claims under a policy similar to the one issued to plaintiffs.

9. Any minutes and syllabi of a policy forms committee, board of directors, policy committee, claims committee, agents' committee, or similar group relevant to the handling of plaintiffs' claims.

10. All educational materials for the training of the insurer's sales agents, claims adjusters, and other personnel who were involved in processing plaintiffs' policy and claims.

11. The claims manual, for any wind damage, tornado damage and fire claims made with Frankenmuth Mutual Insurance Company.

12. Any Wisconsin Insurance Commissioner Office or other governmental review of any relevant issue regarding the processing of

plaintiffs' policy or claims or a policy or claims for wind, tornado or fire damage.

13. Financial reports regarding the new worth, gross assets, net income or loss, net operating income or loss and the net operating income or loss from the sale of policies similar to that which is the subject of this action, including but not limited to any such documents filed with the Office of the Wisconsin Insurance Commissioner.

14. All documents identified in response to your answers to plaintiffs' Interrogatories filed herewith.

15. All reports of GAB Business Service (or any other third party adjusters) and any contractors provided to Frankenmuth Mutual Insurance Company pertaining to the claims of Robin and Karen Zahran.

October 5, 1990

signed _____

Robert C. Burrell
BORGELT, POWELL, PETERSON &
FRAUEN, SC
735 North Water Street
Milwaukee, Wisconsin 53202
(414) 287-9111

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Rec'd 11/30/90

ROBIN ZAHRAN and KAREN ZAHRAN)
)
Plaintiffs,) No. 90-C-337
)
v.)
FRANKENMUTH MUTUAL INSURANCE)
COMPANY, a corporation,)
)
Defendant.)

FRANKENMUTH'S RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

NOW COMES the Defendant, FRANKENMUTH MUTUAL INSURANCE COMPANY, by and through its attorneys, CLAUSEN MILLER FORMAN CAFFREY 7 WITOUS, P.C., and pursuant to Rule 34, responds to Plaintiffs' First Request for Production of Documents:

1. All files of FRANKENMUTH MUTUAL INSURANCE COMPANY involving claims of ROBIN and KAREN ZAHRAN will be produced.

2. All underwriting files of FRANKENMUTH MUTUAL INSURANCE COMPANY pertaining to insurance policies issued to ROBIN and KAREN ZAHRAN will be produced.

3. It is unclear to this Defendant as to what Plaintiffs intend by the term "agent." This Defendant answers that it will produce all claims file material regarding ROBIN and KAREN ZAHRAN.

4. This Defendant has no documents in its possession as described in Request for Production No. 4.

5. This Defendant will produce all claims documents in its possession that respond to Paragraph 5, including those pertaining to items (a)-(e).

6. This Defendant objects to Request for Production No. 6 as being overly broad, burdensome and unlikely to lead to the discovery of any relevant material.

7. This Defendant will produce all documents in its possession answering Request for Production No. 7.

8. As to that portion of the Interrogatory directed to "any claims under a policy similar to the one issued to Plaintiffs," this Defendant objects to Request for Production No. 8 as being overly broad, burdensome, and unlikely to lead to the discovery of any relevant material. As stated above, all documents in possession of Defendant regarding Plaintiffs' claim will be produced.

9. None.

10. None.

11. None.

12. Objection. This Defendant objects that this Request for Production is overly broad, burdensome, and it unlikely to lead to the discovery of any relevant material. In addition, this Defendant objects to the use of the phrase "any relevant issue" as being vague and ambiguous. Without waiving this objection, FRANKENMUTH states that it has no knowledge of

any Wisconsin Insurance Commissioner Office or any other governmental review regarding the processing of Plaintiffs' policy.

13. Objection. This Defendant objects to Request for Production No. 13 as being overly broad, burdensome, and unlikely to lead to the discovery of any relevant material.

14. All documents identified in response to the Plaintiffs' Interrogatories will be produced.

15. All documents answering this Request will be produced.

signed.

Margaret M. Hupp
CLAUSEN MILLER GORMAN CAFFREY
WITOUS, P.C.

EXHIBIT H

SPALDING'S TRIAL TESTIMONY
PAGES 898 TO 902

Q. You were going to send -- you wanted to get this matter cleared up rather even before you got that first proof of loss from Mr. Zahran, correct?

A. Well, we want to resolve all matters.

Q. The proof of loss itself wasn't all that important in terms of paying him. Your company apparently was estimating and attempting to arrive at the loss on its own, correct?

A. I won't say that the proof of loss is not important. When we made our payments we did waive the proofs of loss only so Mr. Zahran wouldn't feel by signing the checks that he was signing off on the claim or if there was something else that was still pending. So we did waive those. We wanted the insured to be comfortable that he wasn't going to be signing something tantamount to a release on his claim.

Q. And as a matter of fact, you wouldn't have

had him attempt and compute the loss and said let's get it resolved this week on July 23, 1989, correct?

A. Yes.

Q. And that's before you got Mr. Zahran's proof of loss, correct?

A. His proof of loss would have come in subsequent to the 25th sometime, so, yeah, that was prior to that.

Q. Okay. There are a multitude of references in the claims file for barn number 154 as being this entire complex, that is, what you've been referring to I believe as the milk shed and the grain shed. Correct?

A. I don't believe the file has a lot of references to 154.

Q. Well, as a matter of fact, didn't you estimate the loss to the grain shed which is part of 154?

A. Did I estimate it?

Q. Yes, that's what I'm asking.

A. Well, I don't remember estimating it. I mean, if there's something in there that says I did I'll be glad to look at it. But --

Q. Let me show you. Exhibit 2, Plaintiff's exhibit, page 20 up at the top, grain shed. See that?

A. Yeah, but that has no reference to 154.

Q. What is that grain shed?

A.. That's part of 151.

Q. You're saying that this grain shed is a part this building, right?

A. I don't remember it being referred to as a grain shed during this trial. But that building that you have in your right hand, yes, is a building that was built of the same basic construction at the same basic time as 151.

Q. And that's what you're referring to over here at page 22 when you're estimating the loss, correct?

A. Actually, again, there was confusion on the--

Q. Just answer the question. Is that what you're estimating that grain shed that I've been pointing to, okay?

A. I believe at that time I thought that that was 152. That's where the $4,000 that I came up with ultimately came from.

Q. Is that a fact? Well, you've got 4500 down here, did you want to bargain the other 5500 away from him? Is that it?

Mr. Hoey: Objection, move to strike.

The Court: Overruled.

By Mr. Kmiec:

Q. You're saying that grain shed on page 20 now refers to building 152, is that what you're saying?

A. I believe at the time I wrote that up it was 152.

Q. Okay. But you only paid him 4,000 for building 152, correct?

A. Actually, as I said, the total amount was 12,000 something, and we also paid for --

Q. Your paid him 4,000 for building 152. Is that correct?

A. Plus the amounts that we paid for with the estimate as submitted by Mr. Krueger.

Q. You don't have to read the figures, but tell me what you're estimating here at the grain shed. Number one is what?

A. It says, "frame out, material, labor."

Q. What does "frame up" mean? Wood?

A. Yeah, right.

Q. Barn 152 is not wood, right. It's masonry, right?

A. That's right. But I think he might have done some temps.

Q. Temps on what, on 152?

A. Right.

Q. Who did temps on 152.

A. All I can say is it was confusing in looking

at the estimate as to exactly which building, since they were connected, which one they were working on.

Q. Assuming for the minute -- you said a moment ago that this building here you felt was part of 151, right?

A. That's correct.

Q. Okay. Now, Mr. Zeller gave you an estimate, okay, that was submitted to you for $25,500 to repair this grain shed. If it was covered under 151, why didn't you pay it?

A. First of all, he didn't give us an estimate of $25,000 to repaid it. He said it should be repaired and then went on and said here is an estimate for replacing it.

Q. I meant that. I meant that he gave you an estimate of twenty-five-five to replace this. Correct?

A. Correct.

Q. Why didn't you pay it -- if it's covered

under 151, why didn't you pay that?

A. He said it should be repaired and we paid to have it repaired.

Q. What, the 4500?

A. Mr. Zeller is who you're referring to in your question.

Q. Yes.

EXHIBIT I

PATRICK HARMON DEPOSITION

PAGES 104, 219 and 220

Q. Put it more easier. Did I state to you that I do not want to get paid twice?

A. At some point in time you I believe used phraseology similar to that, yes.

Q. So I did state to you that?

A. You did make a statement which I interpreted to mean that.

Q. Did you tell Mr. Brueker that, your attorney, my conversation with you?

MR. FITZPATRICK: I'm going to object on the basis of attorney/client privilege and instruct the witness not to answer.

MR. HARMON: Do I have evidence that would support that someone lied?

Q. Yes, sir.

A. No. I do not.

Q. In this proof of loss, anybody tried, either Robin or Karen Zahran tried to cheat

Frankenmuth Mutual Insurance Company out of money?

Q. Did robin or Karen Zahran try to cheat, steal, misrepresent or fraud Frankenmuth Mutual Insurance Company out of money?

MR. FITZPATRICK: It you understand the question and you can answer it.

THE WITNESS: I lack sufficient detail to answer that question.

ZAHRAN: Q. To your best knowledge, sir?

WITNESS: To the best of my knowledge, are the representations on the sworn statement of proof of loss executed by Robin and Karen Zahran such that I would have evidence that they deliberately made any false representations? The answer to that is no.

MR. ZAHRAN: Q. Thank you. Do you know of anybody that would now there is false representations on this proof of loss?

A. I'm not aware of anyone.

EXHIBIT J

ROBIN ZAHRAN TRIAL TESTIMONY

PAGES 449 TO 452

Q. So he did take an insurance application.

A. Yes.

Q. Now, at that time period you were still living in Illinois. Is that true?

A. I'm still living in Illinois.

Q. Okay. And at that time period, this would have been the spring of 1989, let's say.

A. It would have been in that period of time.

Q. Was anyone living at the farm at that time?

A. At the farm? In the spring of 1988. Yes.

Q. And who was living at the farm at that time?

A. We had Louie, a guy named Louie, and Fernando.

Q. Were they related to you in any way?

A. No, sir.

Q. Do you have a brother-in-law? Does Mrs. Zahran have a brother?

A. She does.

Q. Has he ever lived at the farm.

A. No, sir.

Q. Did you ever tell Mr. Rush when you were applying for the insurance company that your brother-in-law lived at the farm?

Mr. Kmiec: I'm going to object, Your Honor, unless there's some significance to this testimony.

The Court: Overruled. Proceed.

The Witness: I never.

By Mr. Hoey: You're saying you did not?

A. I never did.

Q. Let me show you what's been marked as Defendant's Exhibit number 2.

Mr. Kmiec: Your honor, I'm going to object to the use of this exhibit. It hadn't been furnished to us pursuant to the court's order.

Mr. Hoey: Your honor, the exhibit was listed on our pretrial statement.

Mr. McConville: It wasn't provided in

response to discovery requests, however.

The Court: Well, it was listed, Counsel, it would seem to me that you had notice of its existence. Overruled. Proceed.

By Mr. Hoey:

Q. Mr. Zahran.

A. Yes, sir.

Q. This farmowner's application.

A. Yes, sir.

Q. Does it contain your signature on one of the pages?

A. Mind if I take time to look at it?

Q. Sure.

(Witness peruses document.)

The Court: Perhaps you could direct him to the page where his signature appears, Counsel, and we can move along.

By Mr. Hoey:

Q. Is that your signature?

A. Yes, sir.

Q. And did you sign it on or about July 16, 1988?

A. That's correct.

Q. And did you sign it at Mr. Rush's office?

A. No.

Q. Where did you sign it?

Mr. Kmiec: Your honor, again, we're going to object to the use of this exhibit. We see that we were furnished with what appears to be a part of this exhibit on December 9th of 1991, but we were not furnished with this document.

CLAUSEN MILLER GORMAN CAFFREY & WITOUS PC

10 S. LASALLE STREET

CHICAGO, ILLINOIS 60603-1098

312-855-1010

December 9, 1991

Christopher A, McConville, Esq.

Kmiec Law Offices

3741 W. National Avenue

Milwaukee, Wisconsin 53202

Re: Robin Zahran and Karen Zahran

v. Frankenmuth Mutual Insurance Co.

Case No.: 90 c 0337

Our File No: 10 90 53 00 9

Dear Mr. McConville:

Please find enclosed two additional defendant's exhibits which will be identified as Exhibits DX57 and DX58. These documents were obtained from Mr. Lewis Rusch.

Very truly yours,

CLAUSEN MILLER GORMAN CAFFREY & WITOUS PC

BY: SIGNED

James M Hoey

JMH/amh

JMH-LE1756

Enclosures

To BW

Date 7-18 Time 10:20

WHILE YOU WERE OUT

M LOUIE RUSH

OF KRANZUSCH

PHONE 414-989-1950

TELEPHONED X PLEASE CALL X

MESSAGE: CALL BACK ASAP THAT IS

HIS HOME PHONE

FRANKENMUTH MUTUAL INSURANCE CO.

Submitting FO app Insured-owner lives in Illinois. Brother-in-law lives in bldg at loc #1. Brother-in-law works on farm for insured. Insured is there every weekend to work and manage the farm. Loc #2 had bldg and outbldgs. Outbldgs are not insured due to being vacant. Bldg at Loc # is to be occupied by married farm employee as of 8/1/88. It has a woodburner. App is in the mail.

ROBIN ZAHRAN'S TRIAL TESTIMONY

PAGES 528 TO 531

Q. Now, is it correct that farm sustained a fire loss in July of 1990?

A. Yes.

Q. And there was fire damage to barn 151. Is that true?

A. Yes.

Q. And as a result of that fire loss, did you submit a sworn statement in proof of loss to Frankenmuth?

A. Yes.

Q. Let me show you Defendant's Exhibit Number 13.

Mr. Kmiec: Your honor, I object to -- this is exhibit what, 13?

Mr. Hoey: 13.

Mr. Kmiec: This is 1.

Mr. Hoey: That's the exhibit number at the bottom.

Mr. Kmiec: I see, I'm sorry, okay. We object to this, Your Honor, on the grounds of relevancy and our previous conversations about this subject matter.

The Court: For what purpose is this being offered, Counsel?

Mr. Hoey: Your Honor, it's being offered to show that there was a fire to barn 151.

The Court: He's already testified to that.

Mr. Kmiec: Your Honor, I'm going to object to counsel discussing this out loud in front of the jury.

The Court: Well, I hate to take the time to excuse the jury. What is it that it's being offered for? He's already testified that there's a fire, that he submitted a proof of loss. Now what is it that's going to be accomplished by this exhibit?

Mr. Hoey: To show that a claim was made for the limits of Barn 151 and that Frankenmuth made

payment for those limits.

Mr. Kmiec: Your Honor, this is precisely the subject matter that is objectionable.

The Court: Can't you ask him that and if he denies it then pursue this exhibit?

Mr. Hoey: I suppose I could, but I would prefer to introduce the exhibit.

The Court: Well, we'll proceed the way I suggested, Counsel.

Mr. Hoey: Yes, Your Honor.

By Mr. Hoey:

Q. As a result of the fire which involved barn 151, did you make claim to Frankenmuth for the total limit of liability for that particular barn which was $75,000?

Mr. Kmiec: Your Honor, we're going to object to the relevancy of that question --

The Court: Overruled.

Mr. Kmiec: --to the issues of this lawsuit.

The Court: Proceed.

The Witness: Yes.

By Mr. Hoey:

Q. And were you paid by Frankenmuth in November of 1990 an amount which included $75,000 for barn 151?

Mr. Kmiec: Your Honor, same objection.

The Court: Overruled.

The Witness: 75 is not correct.

By Mr. Hoey:

Q. I said were you paid an amount which included $75,000 for barn 151?

A. 151 did not have $75,00 for what you're talking about.

Q. Let me show you what we have marked as Defendant's Exhibit Number 43.

Mr. Kmiec: Your Honor, again, this deals with the same objectionable subject matter. Counsel is simply setting further and further into this. I think the court has ruled previously.

The Court: Members of the jury, I guess I'll have to ask you to return to the jury room briefly.

FROM FRANKENMUTH'S BRIEF AND ARGUMENT OF DEFENDANT-APPELLEE FOR FIRE LOSS (No. 93-2853)

The "Alleged" Arson

Plaintiffs repeatedly assert that the barn fire resulted from arson or some "hate crime" by one of a variety of potential suspect, including Frankenmuth and the Manitowoc County Sheriff's Department, and that robin Zahran is innocent off any wrongdoing. (plfs' br. pp. 16, 32-34) As Frankenmuth never raised arson as a coverage defense but in fact paid plaintiffs $99,950.50 on their barn fire claim (regardless of its cause of origin), plaintiffs' argument is clearly moot.

The "Brother-In-Law" Controversy

Plaintiffs' argument that Robin Zahran did not tell independent insurance agent Lewis Rusch that Zahran's brother-in-law ran the farm (Plf' Br. pp. 18, 32) is likewise irrelevant insofar as

Frankenmuth has never alleged misrepresentation by plaintiffs in this regard.

EXHIBIT "K"

OPENING AND CLOSING ARGUMENTS

On opening statement, volume II, page 115, council states then in July, 1990; Frankenmuth still on risk, they are still insuring Mr. Zahran. July of 1990, there is a fire in Barn 151 and 152. He told the jury that they paid, after the suit, on the fire to Barn 151 in the amount of $15,000.00.

903 ON

The court stated that there was no compliance of its' orders in the pretrial dealing with numbers, approval, or offering of exhibits. V. VI 904

The court continued to state that the evidence is sparse as to how the figures were arrived at. VI 912

The court stated in 914 that there is enough confusion in the record.

Defendant's attorney's closing argument: All the council's argument is he (means) Robin

didn't keep his side of the deal.

He said, did Mr. Zahran page 936, if you say yes, you need to go no further.

CLOSING ARGUMENT

This case is about a man who kept grabbing for more, and it's up to you to send that man that message.

In page 938

That if Robin Zahran misrepresented the damage, it would void his policy.

Now this is your chance to say hey, this shouldn't be allowed. This is not the way business is done, it's time to put a stop to this and to say the policy is void.

There is five records, have a look at them and see what he went through trying to find somebody who Mr. Zahran had not rubbed the wrong way, that wanted to get involved in this claim. P 942.

Then we have a fire in Barn 1551 in July, 1990. Mr. Zahran mad a claim for the limit, when asked if Frankenmuth paid it, you might remember that he first denied it. P. 946. His attorney believe that he is entitled to more money on Barn 151.

In conclusion, ladies and gentlemen, we submit that Mr. Zahran just went too far, he violated the policy provision. The policy is void, and that you should answer the first question yes.

EXHIBIT "L"

JURY INSTRUCTIONS

The Court instructions and explanations to the jury for the Frankenmuth claim. Frankenmuth relied on the statements made by the Zahrans which were material and/or statements which were made with the intent to deceive the Frankenmuth Insurance Company.

The burden is on Defendant to convince you to a reasonable certainty by evidence that is clear, satisfactory and convinces that the question should be answered yes.

Proof of loss statements about the value of the property and the amount of damage there for submitted by the Zahrans are material facts or circumstances concerning the loss.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

PAGE 969

Now, I might point out to you, jurors, at this time, that the amount as I had indicated earlier that was paid by the insurance company

should be deducted by you from any award of damage that you might find. And in the instructions here I've pointed out the amount that has been paid.

EXHIBIT "M"

COURT DISCUSSION AFTER JURY INSTRUCTION

MR. KMIEC: Yes, your Honor. During the conference with our law clerk, Mr. McConville appeared and he objected to question number one that is on the special verdict. So I'd like to just be sure that that's a part of the record.

I had indicated to the court as a preliminary matter, of course, that we had requested that question number 1 be eliminated in totality on the basis that there was absolutely no evidence in this record that would support the inclusion of that question on the special verdict. And if the court recollects, the only person that was in a position I believe to be able to offer evidence on that issue would have been Mr. Spalding, and he didn't touch, didn't touch that area.

THE COURT: Well, as you know, Counsel, this is the first time that this objection has been brought to the court's attention. I don't

quarrel at all with the fact that you may have discussed it with the law clerk, but I was not made aware of it at our conferences on Monday or any of our subsequent meetings.

THE COURT: I can appreciate your concern and it does raise some interesting legal questions in this particular type of case. But I really don't feel that there is any better way of approaching the matter at this stage than to allow the verdict to continue on as it is in the form that it is and trust to the competency of our jury system. They may correct our mistakes.

MR. KMIEC: Your Honor, just in terms of.. and I understand that I assume the court has tentatively ruled at least on our request. It's a new area of law, there isn't much law on it, and we may be in a position to ...you know, to set some standards in respect to those kind of issues. It just doesn't made sense to me that you void legitimate claims because of some

alleged misrepresentation. The question..

THE COURT: I think the theory, Counsel, on that is that courts have held that there is no other way of preventing people from making false claims if there is no penalty associated with it. In other words, why not inflate your loss because the worst that can happen is that they're going to cut you down.

Well, our courts have held that there's got to be some way of prohibiting this practice, and one of the ways that they have permitted is the provision in a policy which causes the policy to be voided if there are such fraudulent misrepresentations as to material facts. And I think the instructions clearly distinguish between somebody who merely overvalued his loss as opposed to somebody who surreptitiously or otherwise attempted to conceal the true value and the true loss. I think the only way that we could have a viable insurance industry today

would be if that type of procedure and that provision were honored.

I think on the other hand the greatest safeguard from the insured's standpoint is that jurors I think have a tenency to excuse those acts if there is evidence..or excuse.. at least in those cases that we've tried here that's been my experience that they have done a pretty good job of excusing insured.

MR. KMIEC: See, I'd like to see the law defined in terms of what items were misrepresented. And if they were misrepresented, then that item should be stricken from the claim. That I can appreciate. But not to somehow go back and wipe out even claims that were paid. They're seeking reimbursement for the $182,000 if the jury answers that question yes. That's been their stated position to me.

THE COURT: Well, if there is support for that the court would be glad to look at it, but I

would strongly question in the manner in which these checks were tendered that there would be a basis for that, Counsel.

JUROR BOEHME: 9:00?

THE COURT: If it's the day after Christmas I doubt if you want to start before 10:00, but..

JUROR GIELOW: If we don't finish on Thursday and into Thursday evening and she's gone on Friday, what does this mean: Can it continue into Monday or we come back.. because then that goes into my vacation, the 28th through the 1st.

THE COURT: Well, why don't we wait and see if that happens.

THE COURT: Well, I will be here. Frankly, I think there's a limit as to how much time you can spend on the subject, and it seems to me that if you got started, say, at 10:00 o'clock in the morning you'd have two hours.

JUROR BOEHME: We just have one question we're going to give and you can maybe tell us on

Thursday.

THE COURT: Let me see if it's something ..quite often if it's...

JUROR BOEHME: There's just a little confusion with some of the people. We're just confused a little.

(Pause.)

THE COURT: No, they have just the one that you have the exhibit, I think it's Exhibit Number 1 which is the policy. Okay?

JUROR BOEHME: See, the problem they're having is if the buildings and all that is separate from like a limit on personal property. Do you understand what I'm saying? They've got the buildings and their limits and then there's personal property is what some people are confused about. Is that separate from the buildings, is there a separate limit?

THE COURT: Yes.

JUROR BOEHME: Okay. But it's all in one

policy.

THE COURT: It's all in one policy. The personal property has a limit and then each of the units or buildings have certain limits of coverage. All right.

EXHIBIT "N"

GENERAL POLICY TERMS

AGREEMENT

This policy subject to all of its terms, provides: insurance against loss to property, personal liability insurance and other described coverages during the policy period as shown in the Declaration; effective at 12:01 A.M. standard time at the address of the named insured as stated in the Declaration, in return for payment of the required premium. It consists of this Agreement, the Declaration, the General Policy Provisions, Perils Section, Liability Coverage Section, and any endorsements made part of it.

GENERAL POLICY PROVISIONS

DEFINITIONS

The following definitions apply to this policy:

1. The words you and your refer to the person or persons named in the Declaration.

6. Insured

d. Each person listed above is a

separate **insured** under the policy, but this does not increase **our** limit of liability under this policy.

11. **Property damage** means injury to or destruction of tangible property including the loss of its use.

Coverage d - Blanket (Unscheduled) Farm Personal Property)

g. Portable building and portable structures.

15. **Mortgage Clause**

The word "mortgagee" includes trustee,

a. If a mortgagee is named on the Declarations, a loss payable under Coverage A or B will be paid to the mortgagee and **you**, as interests appear. If more that one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If **we** deny **your** claim, that denial does not apply to a valid claim of the mortgagee, if the

mortgagee has:

6. **Misrepresentation, Concealment or Fraud-** This entire policy is void if, whether before or after a loss:

a. An **Insured** has willfully concealed or misrepresented:

(1) any material fact or circumstance concerning this insurance; or

(2) an insured's interest herein.

b. There has been fraud or false swearings by an **insured** regarding any matter relating to this insurance or the subject thereof.

Under Condition 4. Change, Modification, or Waiver of Policy Terms, the following is added: Knowledge by **our** authorized agent of material facts pertaining to this insurance is considered knowledge by **us.**

A failure by the insured to perform an act required under the policy will not affect our

duties under this policy is the failure was caused by an act, statement, representation or omission by our authorized agent.

Under Condition 6, Misrepresentation, Concealment or Fraud the following is added:

No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless:

1. We rely on it and it is material or it is made with intent to deceive or

2. The fact misrepresented or falsely warranted contributes to the loss.

No failure of a condition prior to the loss and no breach of promissory warranty affects our obligations under the policy unless it exists at the time of the loss and:

1. increases the risk at the time of the loss; or

2. contributes to the loss.

This does not apply to non-payment of premium.